September 1959 • Volume 45 • Number 9

American Bar Association JOURNAL

We are Proud to Offer "BLACK BEAUTY"

The new all VINYL - - - EXTRA CAPACITY - - - "ALL-IN-ONE"

COMPLETE CORPORATE OUTFIT

- - - seal included, fits comfortably into a lustrous, black vinyl, long lasting Slip-case.

DESCRIPTION

CORPORATE RECORD BOOK . . . a rich, black vinyl book with 3 extra large rings. Holds extra certificates or additional minutes *and* pocket seal in zipper pouch. "CORPORATE RECORDS" and border stamped in gold on cover. Corporate name printed on gold insert which slides into built-in acetate protected holder on spine of book.

- MINUTES AND BY-LAWS . . . Consist of title page and 50 blank sheets — or for only $1.00 extra we supply our time-saving *printed* Minutes and By-Laws.
- 20 LITHOGRAPHED CERTIFICATES . . . permanently bound together with stubs, in a special loose leaf section, all numbered. Certificates printed with name, state, capitalization, and officers' titles.
- STOCK AND TRANSFER SHEETS . . . 4 pages, alphabetized subdivisions; permanently bound in a special loose leaf section.
- CELLULOID TAB INDEX SEPARATORS
- POCKET SEAL . . . In our unique zipper pouch of matching black vinyl, fits on loose leaf rings within book; easily removed for convenient carrying in pocket.

Featuring a lasting, matching, black vinyl slip-case into which entire outfit slips — a practical, enhancing addition to library or desk. Overall size — 10⅝" x 2¼" x 11¼".

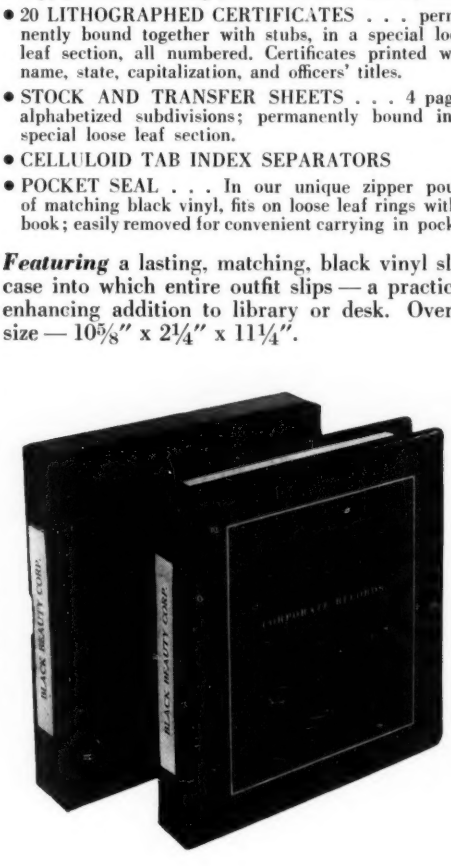
Black Beauty No. 70 — $17.00

As Described and Illustrated with
50 blank sheets for Minutes and By-Laws

Black Beauty No. 80 — $18.00

Same outfit but with
Printed Minutes and By-Laws
Additional certificates 12 cents each.

Preferences, Designations, Clauses, etc., under 200 words, printed on face of certificates—40 Certificates, 1 or 2 classes of stock—certificates evenly divided amongst classes unless otherwise specified. Add $1.50 for each additional group of 100 words or fraction thereof. (Send Copy of Certificate of Incorporation) Add to price.....$12.00
Additional certificates 12 cents each. Each addit. class of stock.....$2.00



WHEN ORDERING

(Postage prepaid if remittance is sent with order)

Print Corporate Name exactly as on Certificate of Incorporation. Give *State* and *Year* of incorporation; No. of shares..... Par Value $..... Capital Stock $..... If stock is without par value specify total amount of Shares..... Is stock Full Paid and Nonassessable?.... Certificates signed by Pres. and.....?

It costs you no more to give your client the compact "BLACK BEAUTY"

Speed

"BLACK BEAUTY"
RUSHED TO YOU BY MAIL ON
SAME BUSINESS DAY ORDER IS RECEIVED
(Specially Printed Certificates Require More Time)

"Black Beauty" is an important addition to our line of *Corporate Outfits.* **$15.** and up. . . . ask for catalog.

Excelsior Stationery Co.

43 Park Place, New York 7, N. Y.
BEekman 3-3037

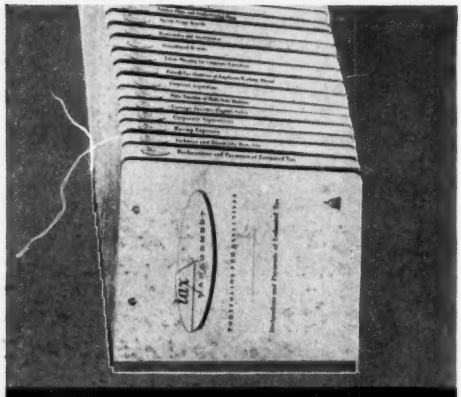
Table of Contents

September, 1959

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois.
Second class postage paid at Chicago, Illinois.
Price per copy, 75c; to Members, 50c; per year, $5.00; to Members, $2.50; to Students in Law Schools, $3.00;
to Members of the American Law Student Association, $1.50.
Vol. 45, No. 9. Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

POSTMASTER: Send notices by Form 3579 to AMERICAN BAR ASSOCIATION, 1155 East 60th Street, Chicago 37, Illinois.

A COMPLETELY NEW APPROACH TO CORPORATE TAX ADMINISTRATION



Topic-by-Topic Analyses of Corporate Income Tax Law with Full Treatment of Each Tax Problem

BNA's Bi-weekly

Tax Management

PORTFOLIOS FOR EXECUTIVES

Taking up where conventional tax services leave off, BNA's TAX MANAGEMENT Service represents a completely new concept in corporate tax administration. It is designed for the person who wants:

(a) practical help in working out effective solutions to corporate tax problems;

(b) expert assistance in putting the most advantageous tax policies and programs into effect in all departments of an organization;

(c) all information on a specific tax problem in one place, in readily usable form;

(d) full treatment of each tax problem with expert "how-to-solve-it" guidance by practicing tax administrators, lawyers, and accountants.

What Each TAX MANAGEMENT Portfolio Contains:

- **a Situation Guide**—listing commonly recurring problem areas and providing references to solutions elsewhere in the Portfolio;
- **a Tax-Pattern Outline**—supplying a brief explanation of typical problems and how to handle them;
- **a Detailed Analysis**—a thorough treatment of all the ramifications of specific tax problems in a given area, to enable the tax administrator to give sound, authoritative advice to management on the *effects* of rulings, decisions, and statutes;
- **WORKING PAPERS—complete set of worksheets for execution, reference, and distribution, providing "what-to-do" guidance to the tax executive, lawyer, and accountant, and facilitating the giving of instructions to accounting, sales, and other departments. They include graphic descriptions of problems; computation work sheets; prototype forms; specimen notices to shareholders, employees, customers, and suppliers; prototype submission documents to Internal Revenue Service (including sample requests for rulings); filled-in special tax return forms; accounting implementation documents (with explanations and comments); reproductions of major tax bills; and similar materials.**
- **a Bibliography**—helpful reference material, including official sources (IRS Rulings, Treasury Regulations, Court Decisions,

Statutes, Committee Reports, etc.), and unofficial sources (CCH, P-H, periodicals, and treatises).

How to Obtain the TAX MANAGEMENT Service

Pictured here are the 31 TAX MANAGEMENT Portfolios presently planned to be made available to subscribers between now and September 30, 1960. Five of these Portfolios are ready. The others will be issued, one at a time, on a regular bi-weekly schedule, *starting Monday, September 14, 1959.*

Each new Portfolio will be accompanied by the bi-weekly TAX MANAGEMENT *Memorandum*, which will show how active tax managers are handling major tax matters, give the views of tax experts—in business, private practice, or government—on tax proposals, and present the consensus of corporation tax officials (at periodic round-table discussions) on the best possible solutions to problems of immediate interest.

Two subscription plans meet the differing needs of those concerned with corporate income taxes. Under the

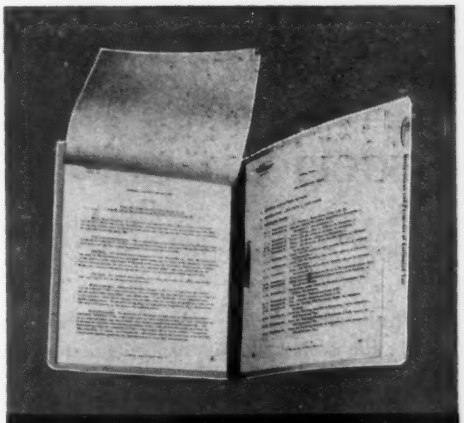
***Memorandum* Subscription Plan**

you can subscribe for the bi-weekly TAX MANAGEMENT *Memorandum* at the rate of $45 per year. If you do so, you will receive as a pre-publication bonus your choice of one of the seven TAX MANAGEMENT Portfolios listed on the order form below. The Portfolio you choose will be up to date at the time it is sent to you. During the term of your subscription you will also have the privilege of acquiring any or all other Portfolios issued, at $22 per Portfolio. If for any reason the TAX MANAGEMENT *Memorandum* and the bonus Portfolio do not come up to your expectations, you may return all materials, express collect, within 30 days for full cancellation of charges. Under the

Full Service Subscription Plan

you can subscribe for all TAX MANAGEMENT Portfolios and the *Memorandum* at $344 per year. You will receive a new Portfolio every other week, 26 issues of the bi-weekly TAX MANAGEMENT *Memorandum*, and, as a special pre-publication bonus, the five Portfolios now ready (the first five listed on the order form). Not only will each Portfolio be completely up to date at the time it is sent to you, but all of your Portfolios—the bonus Portfolios as well as those issued during the term of your subscription—will be kept up to date and revised whenever necessary. If for any reason the Portfolios and the *Memorandum* do not come up to your expectations, you may return all materials, express collect, within 60 days for full cancellation of charges.

Please indicate the Subscription Plan you prefer on the order form below and mail the form back to us today.



Complete Sets of Worksheets for Putting the Most Advantageous Tax Practices into Effect

PUBLICATION SCHEDULE

(Subject to revision)

Starting September 14, 1959, a new Portfolio will be issued every two weeks.

· State Taxation of Multi-State Business · Corporate Acquisitions · Payroll-Tax Problems of Employees Working Abroad · Estate Planning for Corporate Executives · Consolidated Returns · Depreciation and Amortization · Special Fringe Benefits · Pension Plans and Profit-Sharing Plans · Stock Option Plans · Deferred Compensation Plans · Filing of Returns, Collection of Tax, and Refund Procedure · Withholding and Payroll Tax Procedures · Preparation and Use of Schedule M · Special Tax Refund and Payment Problems · Net Operating Loss Deduction · Leased Equipment and Warranted Products · Expenses in New Product Development · Travel and Entertainment Expenses · Inventory Methods · Reserve for Bad Debts and Estimated Expenses · Accrual of State, Local and Federal Taxes · Corporate Dividend Distributions and Stock Redemptions · Corporate Liquidations · Foreign Operations – Base Companies · Federal Excise Taxes · Audit and Conference Procedures

The Bureau of National Affairs, Inc.
1231 24th Street, N. W., Washington 7, D. C. abaj/9

Check one

☐ I wish to accept the *Memorandum* Subscription Plan. Please enter my order for TAX MANAGEMENT *Memorandum* at $45 per year, and send me as a pre-publication bonus the TAX MANAGEMENT Portfolio I have checked alongside. I understand I may return all materials, express collect, within 30 days for full cancellation of charges.

☐ I prefer to accept the **Full Service** Subscription Plan. Please enter my order for TAX MANAGEMENT Portfolios and the bi-weekly TAX MANAGEMENT *Memorandum* at $344 per year, and send me as a pre-publication bonus the first five Portfolios listed alongside. I understand I may return all materials, express collect, within 60 days for full cancellation of charges.

NAME_____

ORGANIZATION_____

ADDRESS_____

CITY_____ ZONE_____ STATE_____

SIGNED_____

Add sales tax where applicable

TAX MANAGEMENT *Memorandum* subscribers should check *one* of the seven Portfolios listed below. Full Service subscribers will automatically receive the first five as a pre-publication bonus, and the other two as part of the Service.

- ☐ Declarations and Payments of Estimated Tax
- ☐ Sickness and Disability Benefits
- ☐ Moving Expenses
- ☐ Corporate Separations
- ☐ Foreign Income–Export Sales
- ☐ State Taxation of Multi-State Business
- ☐ Corporate Acquisitions

published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $7.00; Municipal Law, $5.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $5.00; Real Property, Probate and Trust Law, $5.00; Taxation, $8.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois. An application for membership should be accompanied by a check for dues in the appropriate amount as follows: $16.00 for lawyers first admitted to the Bar in 1954 or before; $8.00 for lawyers admitted in 1955, 1956 and 1957; and $4.00 for lawyers admitted in 1958 or later.

Manuscripts for the Journal

■ **The JOURNAL is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.**

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

Manuscripts are submitted at the sender's risk and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

American Bar Association

HEADQUARTERS OFFICE:
1155 EAST 60th STREET, CHICAGO 37, ILLINOIS.
Telephone: HYde Park 3-0533
WASHINGTON OFFICE:
1025 CONNECTICUT AVENUE, N.W., WASHINGTON 6, D. C.
Telephone: MEtropolitan 8-6124

Officers and Board of Governors 1959-60

President JOHN D. RANDALL, American Building, Cedar Rapids, Iowa
President-Elect WHITNEY NORTH SEYMOUR, 120 Broadway, New York 5, New York
Chairman, House of Delegates SYLVESTER C. SMITH, JR., 18 Bank Street, Newark 1, New Jersey
Secretary JOSEPH D. CALHOUN, 218 West Front Street, Media, Pennsylvania
Treasurer GLENN M. COULTER, Ford Building, Detroit 26, Michigan
Executive Director JOSEPH D. STECHER, 1155 East 60th Street, Chicago 37, Illinois
Assistant Secretary RICHARD H. BOWERMAN, 205 Church Street, Box 1936, New Haven 9, Connecticut

Ex Officio
- The President,
- The President-Elect,
- The Chairman of the House of Delegates,
- The Secretary,
- The Treasurer,
- ROSS L. MALONE, *Last Retiring President*, Roswell Petroleum Building, Roswell, New Mexico
- TAPPAN GREGORY, Editor-in-Chief, *American Bar Association Journal*, 105 South LaSalle Street, Chicago 3, Illinois

First Circuit	WILLOUGHBY A. COLBY, 18 School Street, Concord, New Hampshire	*Sixth Circuit*	GLENN M. COULTER, Ford Building, Detroit 26, Michigan
Second Circuit	WHITNEY NORTH SEYMOUR, 120 Broadway, New York 5, New York	*Seventh Circuit*	BENJAMIN WHAM, 231 South LaSalle Street, Chicago 4, Illinois
Third Circuit	ROBERT K. BELL, 801 Asbury Avenue, Ocean City, New Jersey	*Eighth Circuit*	DONALD D. HARRIES, Wolvin Building, Duluth 2, Minnesota
*Fourth Circuit**	EGBERT L. HAYWOOD, 111 Corcoran Street, Durham, North Carolina	*Ninth Circuit*	WALTER E. CRAIG, First National Bank Building, Phoenix, Arizona
Fifth Circuit	E. DIXIE BEGGS, Brent Annex, Box 1030, Pensacola, Florida	*Tenth Circuit*	FRANKLIN RITER, Kearns Building, Salt Lake City 1, Utah

**The District of Columbia Circuit is considered a part of the Fourth Circuit for the purposes of the Board of Governors.*

Board of Editors, American Bar Association Journal, listed on page 944

Advisory Board of the Journal

Alabama	DOUGLAS ARANT, Birmingham	Montana	ARTHUR F. LAMEY, Billings
Alaska	R. E. ROBERTSON, Juneau	Nebraska	ROBERT G. SIMMONS, Lincoln
Arizona	CHARLES H. WOODS, Tucson	Nevada	JOHN W. BONNER, Las Vegas
Arkansas	EDWARD L. WRIGHT, Little Rock	New Hampshire	WILLOUGHBY A. COLBY, Concord
California	JAMES E. BRENNER, Stanford	New Jersey	NICHOLAS CONOVER ENGLISH, JR., Newark
Colorado	ORIE L. PHILLIPS, Denver	New Mexico	CHARLES F. MALONE, Roswell
Connecticut	CHARLES W. PETTENGILL, Greenwich	New York	ORISON S. MARDEN, New York
Delaware	JOHN BIGGS, JR., Wilmington	North Carolina	MAURICE T. VAN HECKE, Chapel Hill
Dist. of Columbia	ASHLEY SELLERS, Washington	North Dakota	FLOYD B. SPERRY, Golden Valley
Florida	J. LANCE LAZONBY, Gainesville	Ohio	RALPH WILKINS, Columbus
Georgia	CHARLES J. BLOCH, Macon	Oklahoma	ALFRED P. MURRAH, Oklahoma City
Idaho	A. L. MERRILL, Pocatello	Oregon	JAMES C. DEZENDORF, Portland
Illinois	JOHN A. DIENNER, Chicago	Pennsylvania	JOHN G. BUCHANAN, Pittsburgh
Indiana	RICHARD P. TINKHAM, Hammond	Rhode Island	HENRY C. HART, Providence
Iowa	JOHN D. RANDALL, Cedar Rapids	South Carolina	WALTON J. McLEOD, JR., Walterboro
Kansas	W. D. P. CAREY, Hutchinson	South Dakota	ALLEN L. AUSTIN, Watertown
Kentucky	ROBERT P. HOBSON, Louisville	Tennessee	WALTER P. ARMSTRONG, JR., Memphis
Louisiana	LEDOUX R. PROVOSTY, Alexandria	Texas	DILLON ANDERSON, Houston
Maine	DAVID A. NICHOLS, Camden	Utah	FRANKLIN RITER, Salt Lake City
Maryland	EMORY H. NILES, Baltimore	Vermont	DEANE C. DAVIS, Montpelier
Massachusetts	FRANK W. GRINNELL, Boston	Virginia	T. MUNFORD BOYD, Charlottesville
Michigan	WILLIAM T. GOSSETT, Dearborn	Washington	JOSEPH H. GORDON, Tacoma
Minnesota	HENRY C. MACKALL, Minneapolis	West Virginia	ROLLA D. CAMPBELL, Huntington
Mississippi	GIBSON B. WITHERSPOON, Meridian	Wisconsin	CARL B. RIX, Milwaukee
Missouri	JACOB M. LASHLY, St. Louis	Wyoming	FRANK E. HAYES, Lander

Views of Our Readers

■ **Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the JOURNAL or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

Mr. Celler's Position Disturbs Him

In the June, 1959, issue of the JOURNAL, Emmanuel Celler, Congressman of New York, criticized the position taken by President Ross Malone of this Association about the recent report of its Committee on Communist Tactics, Strategy and Objectives. In view of the stature of both gentlemen, it, perhaps, ill behooves a very minor member of the profession to step into the controversy, but I am as much disturbed by the position of Congressman Celler (and others who attacked the report) as he is of President Malone's.

It is difficult for me to understand what Congressman Celler fears from the report that causes him to object, so strenuously, to it. There can be no question that, right or wrong, the decisions of the Supreme Court criticized by the report (although, in my opinion, the word, "criticized", is an unfair characterization) have helped the Communists. Certainly, Congressman Celler does not believe that it helps our country to have decision after decision involving Communists overturned. It only makes sense to examine the situation and try to correct what is causing it, and this is what the Committee attempted to do. I find it strange that so much heat was created by the mild report in question because I do not believe that, outside of, possibly, Congressman Celler's constituency, many persons, either lay or professional, high or low, are satisfied with the Supreme Court's decision involving Communists.

One opinion of which little is heard and which goes to the heart of the controversy caused by the said report is the concurring opinion of the late Justice Robert H. Jackson in the case of *Dennis* v. *United States*, 341 U. S. 494, 561 (1951), where he pointed out that the nature and scope of the Communist movement requires a distinction to be drawn between cases involving Communists and older decisions dealing with civil liberties. The majority of the Supreme Court and many liberals refuse to recognize this fact in the face of repeated acts that show the local Communists to be only one tentacle of a world-wide organization directed by Moscow. I recommend the reading of this concurring opinion to all persons who are interested in the subject of civil liberties and their relationship to Communists.

In conclusion, it should be noted that the suggestion that it is improper to make objective comment about the decisions of the Supreme Court is completely spurious. The history of the Supreme Court is replete with comment, temperate and intemperate, leveled at it. How can it be otherwise when it hands down decisions of a controversial and far-reaching nature at every court term? I can recall as recently as 1937 when some contemporaries of Congressman Celler excoriated and wanted to pack the Court. While lawyers and law associations should always use restraint in speaking of courts and judges, it is absurd to suggest that there are no occasions when they can speak against them. I personally believe that the Committee on Communist Tactics, Strategy and Objectives performed a valuable public service in making its report, and I hope that neither it nor the Association will be intimidated by the meritless attacks made against them for it.

GEORGE C. DREOS
Washington, D.C.

Space Vehicles and Air Safety

It is always interesting to read articles like that of Gilbert C. Jacobus entitled "Satellites and Astronautics: Current Developments in Space Law", which appeared in your July, 1959, issue.

However, necessary as it may be for us to ponder future hypotheses, we must not neglect actual problems. While students may be pondering passage through the universe, satellites have to be launched, and when they are launched create considerable embarrassment to today's users of that part of the airspace which immediately bounds the earth.

I do hope that your authors will not lose sight of the necessity of traffic policing departing space vehicles in such a manner that the many thousands of aircraft flying today are safe from collision.

ALFRED L. WOLF
Philadelphia, Pennsylvania

Compliments to Mr. Richardson

Some may suggest an improvement in Beethoven or in Van Dyck; and some may prefer that lawyers be memorialized in terms of greatness. But may I publicly extend my compliments to Orville Richardson on his "Definition of an Island: A Short Story of a Long Life" [June issue, page 555] —a beautiful piece of writing.

LLOYD BUCHANAN
Washington, D. C.

He Wants More Shakespeare Articles

The recent appearance of the articles on the authorship of the Shakespeare

(Continued on page 896)

(Continued from page 892)

plays is a welcome departure from the purely legalistic content of the JOURNAL. I look forward to seeing more articles of this sort.

J. B. MEEK

Huntington, West Virginia

Some Flaws in the Communist Resolutions

Freedom to criticize includes freedom to criticize critics of the United States Supreme Court as well as freedom to criticize its decisions. I may add, as one whose former intention to withdraw from the Association was reversed upon consideration of its valuable total program, that criticism of the critics may properly take the form of parting company with them.

Instead, I wish to present the view that the March Resolutions of the House of Delegates on Communism are below the standard the country has a right to expect from lawyers. On No. I, where is the evidence that "concurrent enforceability" is a means of strength rather than a source of weakness? Does No. II do more than make explicit what was implicit in the *Watkins* opinion? The intimation in IV that the *Yates* case concluded that the judicial process could not be applied until bloodshed and treachery had been wrought is either a plain misrepresentation or an argumentative conclusion without the argument. The "whereas" recitals in I and IV hardly furnish argument for the specific proposals in the resolutions, nor do appeals to patriotism, nor does the representative quality of the body whose majority vote approved them. This may be an undesirable method of tendering advice to Congress from organized lawyers.

If the Supreme Court has erred, or if, as the resolutions when read "technically" purport to say, defects in the law have been revealed, I retain the hope that the Association may become on these issues as it has been on many others a channel of reasoned advice to the Congress, based on evidence and argument. With less, the profession should not be content.

IVAN C. RUTLEDGE

Bloomington, Indiana

A Dissent on Appellate Counsel

I dissent strongly from the views expressed by Judge Rossman and Mr. Wiener in articles in the July number of the JOURNAL. Judge Rossman's approach is idealistic and impractical. How often do we find the "fine, upstanding, eagle-faced leader in the law" he admires? We have to deal with the average work-a-day lawyer who takes his case to an appellate court because he feels injustice has been done. From many years of observation I would say that 99 per cent of the lawyers who argue cases before the appellate courts have not only a thorough, comprehensive knowledge of their cases, but have studied and prepared their arguments with the greatest care. However, not all lawyers are equally at home on their feet and almost all lawyers approach an argument before an appellate court with the same feeling of butterflies in their stomachs that even the most experienced actors feel in waiting for their cues. The judicial impatience

(Continued on page 898)

(Continued from page 896)

with the ordinary lawyer, which Judge Rossman's article clearly demonstrates, is a reflection on the Bench. When a lawyer is obviously nervous or ill-at-ease, it should be the part of the court to help him to bring out the facts and the questions of law involved, not to divert him with ill-timed questions, indications of impatience, or expressions of preconceived opinions, and such an attitude would be more in the interests of justice. The average lawyer, outside of the big cities, and the *average* lawyer even in the big cities, argues appellate cases not more than two or three times a year at most and he usually knows exactly what his case is about and what the applicable precedents are. I have seen interruptions from the Bench make a shambles of an argument and a number of instances of judicial behavior showing lack of courtesy and consideration and sometimes actual rudeness. A lawyer is entitled to present his case in his own way whether he be a Choate, a Johnson, or just ordinary John Smith from East Overshoe, Maine. While Judge Rossman deprecates oratory, that is exactly what he admires when he praises the lawyer whose "Macedonian cry" sets the court on fire. Yet a lawyer who talks to the sympathies or innate sense of justice of the judges is quickly brought around with a reminder that they are only interested in the applicable law, notwithstanding that in these days too many judges substitute their own feelings of right for the law laid down in the precedents. In my lifetime I have heard only two speakers to whom I could have continued listening with pleasure after they had finished—William Jennings Bryan and James M. Beck—and on reflection, neither of them had said much. It was their personalities and their elegance of expression that captivated audiences. I once heard the late Owen J. Roberts argue a case before the Supreme Court of Pennsylvania. He argued well and when he said "My time is about up", the Chief Justice, most unfairly as I thought, said "Talk as long as you want, Mr. Roberts, we'll be glad to hear what you have to say." His argument was no better than those of many less prominent lawyers I have heard who would have been promptly choked off had they exceeded their time limits. I say again what I have said elsewhere, that the English system of exploratory discussions, without time limitation, is superior to our system of formal arguments.

In thirty-eight years of practice I have never heard a lawyer express impatience at a question from an appellate judge, in the courts of Pennsylvania and of the United States in which I have practiced or in the courts of Massachusetts which I frequented as a student. I have never heard any discourtesy from the Bar to the Bench, but I cannot say the same in reverse. As Wellman, in his "Gentlemen of the Jury" says, it is hard to imagine any American lawyer presuming to say to a judge what Sir Charles Russell is *supposed* to have said to a judge who interrupted his cross-examination: "Oblige me by holding your silly tongue until somebody speaks to you." Our judges too often forget that the lawyers are their brothers in the profession and that they are at least supposed to be gentlemen, with the dignity and entitled to the respect which that title connotes. If lawyers in Judge Rossman's court express impatience when questioned, all I can say is that the Western Bar must be different from the Eastern. On the whole American lawyers are perhaps too docile.

It may be I have not given sufficient weight to the fact that judges have human frailties, to the boredom inherent in listening to lawyers' arguments day after day, and to the pressure under which judges work (surely it is nothing like that to which lawyers are subjected). If that be so, it merely indicates that judges should also give consideration to the lawyers' burdens and frailties.

As for Mr. Wiener's argument for what would be in effect a separate appellate Bar, it is refuted by the whole history of the English Bar and, in this country, by the examples of such wonderful appellate advocates as the two Choates, Lincoln, Webster, John G. Johnson and a host of others, who were consummate trial lawyers as well.

(Continued on page 904)

we announce with pride
the unique book club event of the century
for Bench & Bar

Conscious that most of our personal law libraries show unfortunate *lacunae* in the vital areas of legal literature, history, philosophy, and judicial thought; and aware of the difficulty of filling such gaps from the normally available sources of everyday trade . . .

A group of your fellow attorneys has formed a *new kind of book club,* one devoted entirely to the finding, disseminating, and when necessary actually publishing in new editions . . .

THE CLASSICS OF LEGAL THOUGHT, HISTORY AND LITERATURE

Not the working tools of our profession, not the casebooks and textbooks, these will be the great seminal works of genius, the towering monuments of legal literature. They will include the rich and classic works, old and new, in the fields of constitutional history, men famous in the law, government, jurisprudence, famous trials, legal essays and fiction, the judiciary. They will be chosen for Club Members by an eminent and distinguished

BOARD OF EDITORIAL ADVISORS:


JUDGE LEARNED HAND


JUDGE ALEXANDER HOLTZOFF


DEAN ROSCOE POUND, EMERITUS


MR. MERLO J. PUSEY


MR. JOSEPH N. WELCH


MR. F. TROWBRIDGE VOM BAUR

This great work of legal historical scholarship opens your Club membership

This rare classic, Pollock and Maitland's HISTORY OF ENGLISH LAW, with a new introduction especially written for our edition by Dean Roscoe Pound, Emeritus, is offered as a special premium to Charter Members, at the unprecedented price of **7.50.**

The original publisher's price for this two-volume set: 30.00.

You may begin your collection of classics with the first of the series of distinguished monthly selections:

THE PRESIDENT: OFFICE AND POWERS,
by Edward S. Corwin, New York University Press.
Publisher's price: 6.50. Special price to members: **5.20.**

These are typical of the extraordinary works to come. All will be books selected as "indispensable companions," to broaden our understanding of the great periods of the law, the philosophy and contributions of men of genius, the development of legal thought—books which have risen to the rank of classics of legal literature.

Your LAWYERS' LITERARY CLUB will offer you original publishers' editions of such works, each month, at savings up to fifty percent. Alternate books will be available from our *Treasure List of Classics,* for those Members who would prefer a book other than the current selection.

GIFT CLASSICS will be selected and sent to each Member, without cost, with every third book accepted, after the initial period of obligation to accept six books during the first year.

mail the card attached to this advertisement today, to become a charter member of the exclusive

LAWYERS' LITERARY CLUB

The Barr Building, 910 Seventeenth Street, N. W., Washington 6, D. C.

(Continued from page 898)

Abraham Lincoln, who had the largest trial practice in his county, is said to have argued 172 cases before the appellate courts of Illinois—a record for his day and not to be despised in ours. Perhaps he didn't argue his appellate cases well, but I think I would have been content to let him appear for me, and his clients, including two great railroads, were apparently satisfied.

It is true there are not many Lincolns or Choates, but I think there are other objections to Mr. Wiener's plan.

First, it would be foolish to deny that occasionally a lawyer becomes so immersed in his case that he cannot see the forest for the trees, and sometimes lawyers develop legal "blind spots", which distort their judgments. In such cases, as in fact in most, consultation with someone who has a detached viewpoint is helpful. But on the other hand, the lawyer who has lived with a case from the beginning has a much more intimate knowledge of it than anyone else is likely ever to have, and there is no assurance that the point of view of a consultant may not also be prejudiced by his past experience with other cases, even insofar as concerns the personal backgrounds and prejudices of the appellate judges. Offhand I recall two instances. In one of them, consulting counsel, taken in after trial to argue a case, in answer to a question from the Bench made a wholly unwarranted admission which resulted in loss of the case, which trial counsel would never have done. In another, in which I appeared for the appellee, the appellants had retained Philadelphia counsel to handle their appeal. The appellate counsel prepared a very excellent brief and argued ably, making a strong impression on the court. But in both brief and argument they had avoided all mention of a case which was directly in point and on which we relied. Several months later the court handed down its decision in our favor, basing it briefly on this case. So there is no panacea in an appellate Bar.

I have seen a ponderous machine brought into the Court of Appeals and its intricacies explained by patent counsel, while the judges, in rapt attention, leaned over the bench to observe every detail. I wonder if a "generalist" could have commanded the same interest.

Second, there is the matter of expense. The average litigant cannot afford to retain "big city" counsel to argue his appeal, as Mr. Wiener concedes, and there is not enough of that type of business and there is too much professional rivalry to enable small-town lawyers to specialize in appellate practice. We tend to exaggerate too much the importance of big cases, forgetting our ideal of "equal justice for all", and overlooking the fact that the issue of a case involving only a few hundred or a few thousand dollars is likely to be even more important to the litigants than a case involving millions may be to a great corporation. The "big" cases are given too much precedence in our courts and are largely responsible for the delays which are said to amount to a denial of justice. Even the Supreme Court of the United States seems to be not much interested in the rights of individuals unless it be in the field of race relations or the criminal law, although it was not always so. The modest litigant therefore must stick to counsel with modest fees and not look to take in additional counsel, especially specialist-generalists to argue his appeal.

I concede that a busy trial lawyer does not have time to prepare appeals. But does anyone suppose that Joseph H. Choate or John G. Johnson did the hack work on the briefs and records they submitted? When a lawyer is in continued demand, he can afford to have assistants do the preliminary work for him, but that does not prove that he is not qualified to *argue* the appeals.

We already have many lawyers who devote most of their time to appellate practice, many of them in the federal and state government services, where the quality of arguments is not impressive, but I submit there is no reason to say that other lawyers are not equally well qualified to argue the cases they have lived with from their inception, and I deny Mr. Wiener's dogma that this, which he concedes to be the general view, "is largely responsible for the generally mediocre level of appellate arguments".

ROBERT RUPPIN

Lancaster, Pennsylvania

(Continued on page 906)

(Continued from page 898)

Abraham Lincoln, who had the largest trial practice in his county, is said to have argued 172 cases before the appellate courts of Illinois—a record for his day and not to be despised in ours. Perhaps he didn't argue his appellate cases well, but I think I would have been content to let him appear for me, and his clients, including two great railroads, were apparently satisfied.

It is true there are not many Lincolns or Choates, but I think there are other objections to Mr. Wiener's plan.

First, it would be foolish to deny that occasionally a lawyer becomes so immersed in his case that he cannot see the forest for the trees, and sometimes lawyers develop legal "blind spots", which distort their judgments. In such cases, as in fact in most, consultation with someone who has a detached viewpoint is helpful. But on the other hand, the lawyer who has lived with a case from the beginning has a much more intimate knowledge of it than anyone else is likely ever to have, and there is no assurance that the point of view of a consultant may not also be prejudiced by his past experience with other cases, even insofar as concerns the personal backgrounds and prejudices of the appellate judges. Offhand I recall two instances. In one of them, consulting counsel, taken in after trial to argue a case, in answer to a question from the Bench made a wholly unwarranted admission which resulted in loss of the case, which trial counsel would never have done. In another, in which I appeared for the appellee, the appellants had retained Philadelphia counsel to handle their appeal. The appellate counsel prepared a very excellent brief and argued ably, making a strong impression on the court. But in both brief and argument they had avoided all mention of a case which was directly in point and on which we relied. Several months later the court handed down its decision in our favor, basing it briefly on this case. So there is no panacea in an appellate Bar.

I have seen a ponderous machine brought into the Court of Appeals and its intricacies explained by patent counsel, while the judges, in rapt attention, leaned over the bench to observe every detail. I wonder if a "generalist" could have commanded the same interest.

Second, there is the matter of expense. The average litigant cannot afford to retain "big city" counsel to argue his appeal, as Mr. Wiener concedes, and there is not enough of that type of business and there is too much professional rivalry to enable small-town lawyers to specialize in appellate practice. We tend to exaggerate too much the importance of big cases, forgetting our ideal of "equal justice for all", and overlooking the fact that the issue of a case involving only a few hundred or a few thousand dollars is likely to be even more important to the litigants than a case involving millions may be to a great corporation. The "big" cases are given too much precedence in our courts and are largely responsible for the delays which are said to amount to a denial of justice. Even the Supreme Court of the United States seems to be not much interested in the rights of individuals unless it be in the field of race relations or the criminal law, although it was not always so. The modest litigant therefore must stick to counsel with modest fees and not look to take in additional counsel, especially specialist-generalists to argue his appeal.

I concede that a busy trial lawyer does not have time to prepare appeals. But does anyone suppose that Joseph H. Choate or John G. Johnson did the hack work on the briefs and records they submitted? When a lawyer is in continued demand, he can afford to have assistants do the preliminary work for him, but that does not prove that he is not qualified to *argue* the appeals.

We already have many lawyers who devote most of their time to appellate practice, many of them in the federal and state government services, where the quality of arguments is not impressive, but I submit there is no reason to say that other lawyers are not equally well qualified to argue the cases they have lived with from their inception, and I deny Mr. Wiener's dogma that this, which he concedes to be the general view, "is largely responsible for the generally mediocre level of appellate arguments".

ROBERT RUPPIN

Lancaster, Pennsylvania

(Continued on page 906)

(Continued from page 904)

The Bar Is *Overcrowded*

The excellent letters of S. John Insalata and H. Andrew Bain in the AMERICAN BAR ASSOCIATION JOURNAL of July, 1959, taking issue with Reginald Heber Smith's denial of the existence of a superabundance of lawyers, merits support. In the November, 1958, issue Mr. Smith concluded from statistics showing a diminishing number of annual admissions that "The Bar Is Not Overcrowded". With proper respect for this eminent authority and for his fine survey of the Legal Profession, I submit that this conclusion is certainly a *non sequitur* and probably erroneous. To disseminate this unsupported statement, fallaciously deduced from a mere count of noses, without reference to the manifold and complex determinative factors, is misleading.

Moreover, to those laboring to protect the public and the Bar from unauthorized practice abuses, it is a disservice in that it lends apparent comfort, in the form of quotable support from a highly respected source, to those urging the baseless rationalization that the violators supply a necessary service to the public for which the Bar is inadequate.

Mr. Smith's subtitle refers to the traditional overcrowding of the Bar as "an Ancient Legend". This characterization of the overcrowding as a myth in the past as well as the present is backed by no evidence at all, and is inconsistent with mountains of published past statistics, as well as the pragmatic experience, particularly in their earlier practice, of most members of the Bar.

The lessening number of law students, as I believe President Ross Malone indicated in a recent address, obviously results from "the low incomes" compared with business and the other professions, notably medicine, engineering and accounting, and from the dwindling share of national income spent for legal services. Indeed, Mr. Smith, himself, cites this as a reason for the decline, and it is conclusively established by the Survey he directs, and related studies by Professor Albert Blaustein and others appearing in the JOURNAL, and elsewhere. Is it not clear that what is occurring is the process known in industry as inventory reduction, which takes place whenever there has been an extended period of overproduction, providing excess supply and resultant unprofitable operations, a condition, unfortunately, still far from corrected?

Coincident with this article's publication, law offices in every city are daily importuned by highly qualified job applicants, many of whom have been searching for months for their first position, in the face of an economy which is said to be in short labor supply in virtually all other fields of endeavor. And bar association committees on professional economics search in vain for an answer to the incongruity of a Bar, better educated and trained than ever before, suffering from inflation out of range of income increase, in the midst of the greatest prosperity for others that the country has known.

In conflict with Mr. Smith's contention, unauthorized practice committees everywhere have found grave danger to a free and independent Bar in the ever diminishing legal work available to the average practitioner because of the inroads effected by large corporate, institutional and union developments, administrative agency practices, the trend toward the concentration of matters in fewer hands, unlawful practice in numerous guises and other factors.

(Continued on page 908)

(Continued from page 906)

To speak of an alleged "serious shortage of lawyers" in the face of this is to spread a misconception which experience teaches is bound to be flung promptly back at us in counterattacks against the Bar's unauthorized practice enforcement efforts for the protection of the public and the profession.

RAYMOND REISLER
Brooklyn, New York

Settling Lawsuits in a Lawyer's Office

The article by Frank W. Brady (May, 1959) on "The Way To Prevent Lawsuits" is most provocative and indicates at least that Mr. Brady has some ideas that mark him as judicial timber. I suggest, however, that the American Bar Association should not leave unchallenged his proposition that it is always proper for one lawyer to serve as counsel for both sides of a legal dispute.

Canon 6 of the Canons of Professional Ethics warns us against representing conflicting interests. How could there be a clearer violation of the letter and the spirit of that Canon than by counsel for one side volunteering to represent the opponent, and then trying to settle the dispute in his own office?

It is amazing that Mr. Brady has been so successful at this method of settling litigation (or disputes without litigation) without being subjected to serious charges of bad faith, lack of ethics or overreaching. I seriously challenge his conclusion that our law schools should teach and encourage this kind of "justice", or that young lawyers should adopt it as proper ethical procedure.

The author has not given examples of specific types of cases which he has settled, so we must presume that he would include everything—boundary disputes, personal injury claims, divorce cases, drafting and interpretation of contracts and all the rest of the fields which make up general practice. I commend him for most of his motives: justice is faster and cheaper, heartaches and ill feelings are prevented, and court calendars are eased.

But what of the dangers of such "office settlements"? Some of them have been referred to in litigation in my court. Litigants have testified that before retaining their own counsel they were represented by the attorney of the opponent who gave certain advice to each side. Each time this has happened, it has caused serious embarrassment to opposing counsel, and in most cases I have suggested that he withdraw at once from the case. In some instances he has promptly associated other counsel so that he himself could take the stand to give his own version.

Even more threatening, it seems to me, is the danger that one or both disputants may contend later that the lawyer forced a compromise to the satisfaction of neither. If the settlement or resulting contract were later challenged on grounds of fraud, would not most courts unhesitatingly set it aside in the interest of good conscience and ethics?

Mr. Brady's suggestions have much merit, but should certainly be tempered with these corollaries:

1. When counsel talks to the opposing party, he should ask if that party has his own attorney and, if so, whether he has consulted with his counsel;

2. No substantial dispute involving over $100 should be settled except by written agreement, signed by both parties and preferably acknowledged;

3. If both parties are represented by counsel, the attorneys should endorse their approval on the instrument;

4. An attorney who attempts to settle a marital dispute by counseling with both husband and wife should withdraw from the matter if litigation follows the unsuccessful effort at reconciliation.

EUGENE A. WRIGHT
Superior Court
Seattle, Washington

Lawyers and Doctors— A Contrast

. . . In our great American marketplace, the seller of quality merchandise with the best advertising usually does the most business. The legal and medical professions are properly deprived of the direct use of this adjunct to their financial success but indirectly the

medical profession profits from it handsomely.

If a sick man does not consult his doctor, he may die. If a man with a legal sickness does not consult his lawyer, all he may lose is his money, his job or his freedom. More and more people use the services of doctors while fewer and fewer use the services of attorneys. Why?

Every hour of the day, TV, radio, newspapers and magazines exhort people to see their doctors at least once a year and their dentists twice a year. Sponsors of these campaigns are life insurance companies, surgical and hospital plans, pharmaceutical houses, employers, the Government and organizations for the prevention and cure of everything from cancer to mental disturbances. These campaigns are worthy because they protect health and life itself.

When is the last time you heard these same media urge people to see their lawyer? Do banks, trust companies, title companies, real estate men, insurance companies and finance companies sponsor campaigns urging people to see their lawyers before borrowing money or signing contracts? Very often the contrary is true. And yet so many of these contracts can so shackle a man's possibility of earning a living that his health may be ruined, his family is in want and he becomes a burden to society.

Fortunately for the health of mankind, the medical profession has guarded zealously its licensed monopoly on the science of healing. Again, fortunately, those who profit from the services of doctors urge frequent consultation. Here the profit motive serves a noble purpose.

The legal profession has not guarded its licensed monopoly on the legal well-being of mankind. Through the years, services which demand legal training and broad experience have trickled out of the hands of lawyers and into the hands of laymen who for the most part are interested primarily in the transaction and not the client. Conditional sales contracts, mortgages, deeds, etc., are either drawn up by the

(Continued on page 928)

A Newspaperman's View:

The Role of the Supreme Court

by **Anthony Lewis** • *of the Washington Bureau of the New York Times*

Addressing the University of Chicago Law School Alumni Dinner last May in Chicago, Mr. Lewis compared the work of the Supreme Court today with that of the period that ended in 1937. One conclusion he drew was that the change in the Court's character during the past twenty years is not so great as it appears to be on the surface: throughout the long line of the Court's decisions there is a recurring insistence upon fairness.

It is no news that the Supreme Court is in controversy. Its place in our structure of government is under closer examination today than it has been for a generation. I thought I might throw some small light on the problem by looking backward—by comparing the role assumed by the Court today with the pattern of an earlier day.

A convenient point of departure is a book published by Felix Frankfurter in 1938, just before he went on the bench: *Mr. Justice Holmes and the Supreme Court.* In an appendix he listed all the cases in which the Supreme Court had held state action invalid under the Fourteenth Amendment. The list runs from 1877 to 1938, an ideal stopping point because it coincides with the beginning of the constitutional revolution that has so changed the character of the Court.

There are 232 cases in the list. An examination of them discloses a remarkably different world of constitutional adjudication.

The primary distinction is, of course, that the Supreme Court in that earlier period spent most of its time on economic issues. We all know that as a generality of history. Nevertheless, it makes a striking impression when one reads through those 232 cases.

Some of them provoked notable dissents by Holmes and Brandeis, and we may remember the decisions for that reason. The Court held unconstitutional statutes fixing a ten-hour day for bakers, forbidding railroad conductors to make up an upper berth unless a ticket had actually been sold, outlawing the use of shoddy in comfortables, limiting the weight of loaves of bread.

Of more interest to me were the decisions in which Holmes and Brandeis joined. They were with the majority in a great many rate cases—decisions setting aside as confiscatory rates set by state public utility commissions for railroads or telephones or the like. They joined in a Hughes opinion in 1931 holding that the equal protection clause of the Fourteenth Amendment was violated by a Florida statute requiring certification of truck lines except those carrying farm and fish products. They joined in a 1928 decision striking down the zoning for residential use of some property in Cambridge, Massachusetts, which bordered industrial land. They joined in the 1923 invalidation of a Kansas statute establishing a labor board with compulsory arbitration powers over disputes in food-processing industries and utilities. Holmes joined in a Hughes opinion of 1915 invalidating a North Dakota statute which endeavored to promote coal production by requiring railroads to carry coal at less than cost while assuring them a fair return on their freight business as a whole.

My purpose is neither to deplore nor to approve the results in those cases. It is simply to indicate the character of what, in their day, were *routine* decisions for the Supreme Court of the United States.

Indeed, the routine, the almost matter-of-fact approach of the Court to the invalidation of statutes is another impression left by those 232 cases. The Justices displayed little embarrassment at the re-weighing of values which is implicit in constitutional adjudication. A decision in 1910 is a good example. Nebraska, troubled by monopoly in the grain business, had passed a law requiring railroads to build a spur to any grain elevator put up near their lines. The Supreme Court, holding that the statute denied due process, said: "Why should the railroads pay for what, after all, are private connections?

We see no reason." The opinion was by Mr. Justice Holmes.

The Court Today . . . A Startling Contrast

How gravely, in comparison, do the Justices of today approach a question of constitutionality! They have been so conditioned by criticism of that earlier Court—their own criticism, in some cases—that they use their great power to review legislation almost gingerly, and with frequently professed reluctance. Nothing has been made clearer to me in my brief period of close observation of the Court than its overwhelming desire to avoid constitutional decisions. Counsel are lectured by members of the Court to that effect at oral arguments. And the cases speak for themselves. Right now the Court has before it again a question which it has avoided again and again in the last decade—the constitutionality of the use of secret informants in security proceedings. And no one would be surprised, I dare say, if the two pending cases raising that question went off on non-constitutional grounds.[1]

Of the 232 cases, I count only twenty-six dealing with what the liberal critics today would call "personal rights". Almost 90 per cent, then, concerned matters of economics. It was not until 1923, in the great case of *Moore* v. *Dempsey*, that the Court upset a state criminal conviction on the ground that the procedure leading to the conviction had been so unfair as to violate the Fourteenth Amendment. It was not until 1927 that the Court first held a state statute invalid as a restriction on speech.

Today those two matters—fair trial and free speech—are the staples of the Court's business under the Fourteenth Amendment, along with problems of racial discrimination. In the last three terms, by my count, the Court has held state action invalid under the amendment in twenty-one cases.[2] You know the cases. They involve the right to read books and see films, to organize labor unions and racial groups without restrictive state regulation, to become a member of the Bar despite assertedly suspect associations; the right of Negroes to attend schools and serve on juries without discrimination, and, again and again, the right to fair procedure.

There has been just one Fourteenth Amendment decision in recent years striking down substantive state economic legislation. That case, *Morey* v. *Doud*, held an Illinois statute regulating currency exchanges bad under the equal protection clause because it exempted the American Express Company. As I understand it, Illinois has met the decision not by abandoning regulation altogether but by removing the exemption for American Express. The Supreme Court subsequently dismissed an appeal from a decision upholding as constitutional other exemptions in the same statute. *Morey* v. *Doud* thus seems to me a rather special case, with no general implications and at any rate not typical of current Fourteenth Amendment decisions.[3]

The change in the character of the issues decided by the Supreme Court on constitutional grounds is just as marked if we look at the federal rather than the state side. According to a Library of Congress tabulation, the Court held seventy-three federal statutes invalid through 1936. Of those, all but eleven concerned economic issues—"yellow dog" labor contracts, for example, or minimum wages. Since 1936, just five decisions have held federal statutes invalid as applied, none of the cases dealing with economic concerns. It is interesting, as a footnote, to observe that the Supreme Court has never in all its history found a federal statute in conflict with the First Amendment to the Constitution.

I should add: I by no means intend to suggest that economic issues are no longer part of the business of the Supreme Court. Far from it. Trade regulation, labor, antitrust law, administrative control of transportation and communications—all these and like matters fill the docket. But they are handled today as matters of statutory construction or under the commerce clause. In either case the Court leaves the last word to Congress. And that, as Professor Paul Freund has pointed out, makes all the difference. For a state to be told that its policy has been foreclosed by the due process clause of the Fourteenth Amendment is a very different thing from being told it has been foreclosed by the Interstate Commerce Act or the Taft-Hartley Act. In the latter case the state is free to seek relief from Congress. And Congress is nothing if not sensitive to demands for state power.

What we are concerned with is the use of those clauses of the Constitution whose "deliberate vagueness", as Justice Frankfurter has put it, left their definition almost entirely to the Court itself. And this great power is now being invoked, as I have said, principally to vindicate three categories of rights: (1) the right to fair procedure, both civil and criminal; (2) the right to free speech and association; (3) the right to equal treatment at the hands of government without regard to race.

The question one must ask is: Why? Why are those the interests which the Court now protects? Why have we seen the remarkable shift in the constitutional business of the Supreme Court?

One answer that might be suggested is that in its use of the Fourteenth Amendment the *old* Court had made itself a "superlegislature", intruding into the most local of affairs, and that abandonment of its approach was merely a necessary corrective to bad history. It is true that one is struck, in reading the old cases, by what now seem to be examples of surprising interference in essentially local matters. At least I find it surprising to have the Supreme Court of the United States examining the zoning of a street in Cambridge, Massachusetts, or the making up of pullman berths.

But I wonder whether some of today's cases would not seem just as surprising to the Justices of a genera-

---

1. The forecast, happily, was correct. See *Greene* v. *McElroy* and *Taylor* v. *McElroy*, 360 U.S. 474, decided June 29, 1959.

2. The total by the end of the 1958-59 term was twenty-six cases.

3. But see *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520, decided May 25, 1959. The decision, holding unconstitutional an Illinois law prescribing "contour" mudguards for trucks, was based on the Commerce Clause. But the approach seemed reminiscent of the substantive due process cases under the Fourteenth Amendment.

tion ago as examples of the Court's reach into local affairs. This year, without a murmur of dissent, the Court struck down the contempt conviction of a witness who had refused to answer questions put by a committee of the Virginia legislature. The Court said the conviction offended the due process clause because the witness had not been clearly apprised of the purpose of the committee's questions. It is fair to guess that, a generation ago, it would have seemed a very long reach indeed for the Supreme Court of the United States to examine the fairness of procedure in a state legislative committee hearing.

As one answer, I would venture the guess that many of the problems which used to concern the Court simply do not exist any longer. State legislatures do not seem to be passing ripper bills aimed at railroads. Confiscatory rates for public utilities are certainly not common.

In their place other problems have arisen. If the Court is taking a new interest in state legislative committees, for example, perhaps it is because some committees have set out to intimidate those who believe in racial equality or other locally unorthodox ideas. The problems before legislatures and executives are very different from those of fifty years ago, and it is not surprising that there should be new problems for the courts, too.

It may also be true that the renunciation of economic power left the Court with what seemed too curtailed a function, so that there was a tendency to move into other fields. Professor Alan F. Westin, advancing this view, has said: "Perhaps, like nature, Supreme Court Justices abhor a vacuum."

The Reason for the Change . . . The Needs of Society

But it is more than that. The explanation of the change in issues before the Court must be, to a considerable degree, the Court's own appraisal of the needs of society—the Court's evaluation of what the political branches of government have left undone, the gaps that should be filled by the judicial power.

I am not suggesting that the question was ever raised so bluntly by members of the Court, or answered explicitly. After all, we are dealing with a movement of history—history, moreover, made up of a flow of cases, each one presenting its special problems, and each in turn influencing the kind of cases lawyers would bring to the Court in the future. But I cannot doubt that the character of the issues decided today reflects, in the end, the feelings of the Justices as to the importance of issues and the necessity and appropriateness of their judicial resolution.

In those terms the interests prominent in today's constitutional litigation are not very surprising. In a world of secret police and totalitarian brutality, it is not difficult to consider fair procedure a fundamental. In a world which has seen and still sees men punished for their ideas, freedom of thought emerges as a root interest. The momentum of world history, as well as our own, militates against racial discrimination. One can reach those conclusions without going through what is for me the useless exercise of arranging a specific scale of freedoms in descending order of importance. My own feeling is that, despite their many deep differences, the Justices of the Supreme Court today are in broad agreement on the nature of the issues which justify judicial intervention.

It is at this point that we face the ultimate questions: Is a court ever justified in substituting its judgment for that of the political branches? Can judicial review be reconciled with democracy? Is there any more warrant for the constitutional decisions of today than for the now rejected decisions of yesterday?

Needless to say, those are difficult questions. Our greatest legal philosophers have not so far produced satisfactory answers, and I cannot hope to add anything very illuminating. But I can suggest some reasons for my own belief in the value of judicial review.

One Insistent Theme . . . The Demand for Fairness

As a preliminary, let me say that the legacy of the old Court does not seem to me a bad one. There were mistakes, bad mistakes, but history rather quickly corrected those. What is left as you read the cases is one insistent theme—the demand for fairness. That the theme is sounded in economic terms does not especially matter. The moral reverberations cross what Judge Hand has rightly termed the indistinct line between economic and other rights.

Here is Brandeis in 1920 upsetting rates fixed by Oklahoma for laundries. The objection was procedural—the only way to test the rates was to violate them and risk a contempt fine of $500 a day. How pertinent that case seems to the procedural snares being set in Southern states today for the National Association for the Advancement of Colored People.

Or examine the rate cases closely. In one, the Illinois Commerce Commission had refused for four years to take any action on local telephone rates that concededly made the company operate at a loss. Or what about a state statute

Anthony Lewis is a native of New York City and a graduate of Harvard College (A.B. 1948). He won the Pulitzer Prize for national correspondence and the Heywood Broun award in 1955 for stories he did for the *Washington Daily News* on the federal loyalty-security program. He joined the Washington Bureau of *The New York Times* in 1955, in which post he covers the Supreme Court, the Justice Department and related legal matters. In 1956-57, he was a Nieman Fellow at Harvard, studying for a year at the Harvard Law School.

that forced a railroad, without compensation, to build an underpass for the benefit of a single farmer? Should it offend us that the Court struck down such special legislation?

A sense of fairness seems to me still the principal contribution of the Supreme Court in our system of government. My observation is certainly that it has a deep influence in instilling that spirit in the Federal Government. It is a rare thing for the Court to hold a federal statute or even Executive action unconstitutional. But the approach of the Court, its known insistence on fair play, has effects far beyond those few cases.

The Justice Department, for example, is acutely aware that the Supreme Court expects it to walk the narrow line. Nothing could be more terrible than the experience of a government attorney who the Court suspects is less than candid in oral argument. The small staff of young men in the Solicitor General's office have effect on department positions through their role of estimating the Court's reaction, often in terms of fundamental fairness. The number of cases in which the Solicitor General persuades the Government to confess error in the Supreme Court—the extraordinarily large number, in my opinion—is a testimonial to the impact of the Court's standards.

Constitutional litigation, whatever its result, may focus attention on moral considerations. We may think it a bad thing, but the American habit of expressing moral outrage at some government policy by bringing a lawsuit does often serve a purpose.

An interesting example is the recent case of *Bartkus* v. *Illinois*. A distinguished lawyer from Chicago, Walter Fisher, argued to the Supreme Court that state prosecution of a man after he had been acquitted of the same criminal act by a federal jury violated the Constitution. The Court held the other way. But the Attorney General of the United States felt strongly enough, after reading the opinions in *Bartkus* and a companion case, to warn against indiscriminate use of the power to bring double prosecutions. Here again constitutional litigation had brought the attention of the Executive Branch to a problem of fairness.

I wonder whether that same function of stimulating sensitivity to considerations of fair play should not carry over into the relations between the Supreme Court and the states. Illinois Supreme Court Justice Walter Schaefer said in 1956, in his Holmes Lecture at Harvard Law School, that the existence of the much-debated federal habeas corpus remedy had inspired state courts to devise their own post-conviction procedures. Even given the prevailing frictions, constitutional decisions hopefully should have a like effect. There is, for example, *Griffin* v. *Illinois*, 351 U. S. 12. As time goes on, will the states not recognize as a legitimate stimulus to their own sense of fairness a Supreme Court decision that a man may not be deprived of a criminal appeal solely because of his poverty?

Judge Wyzanski has expressed much better than I can this aspect of the argument for judicial review. "Does not the availability of broad judicial review", he asked, "induce all agencies of government . . . to proceed more openly, with more conscious measurement of competing values and sacrifices, and with a deeper awareness of the moral responsibility inherent in all choice?" (Book review in the *New York Herald-Tribune*, March 2, 1958.)

A second point to remember in discussing the role of the Supreme Court is that the Court is a working part of government on which the other branches rely. Of course it is true that reliance on courts may diminish legislative responsibility. But once history has divided functions between court and legislature, judicial action has special justification.

The outstanding example is the racial issue. From the earliest days of the Fourteenth Amendment, Congress left to the courts the job of enforcing Negro rights. The fact that the courts took it on was a major reason why pressure for legislation was not greater. Could the Supreme Court in 1954 have ignored that history, and the unmistakable direction of its own decisions, and —as Judge Hand seems to suggest— refused to decide the issue of school segregation? Surely, in the light of history, that would have made policy just as much as the actual decision. It would have constituted effective approval of school segregation—a result, as Professor Freund has said, that would have brought with it intellectual and moral difficulties much graver than the troubles we have had since 1954.

The other branches may rely on the Court especially to do politically difficult jobs. For example, officials can deal with pressure groups for clean literature by saying that a ban on such-and-such a book is impossible because the Supreme Court would knock it out. That may not be the most courageous statement in the world. But it does not bother me if the relatively protected position of the Court is used as a device to defend the right to read of what I believe is a majority against censorship by persons who think *Lady Chatterley's Lover* will corrupt everyone but them.

I was interested to read, recently, statements by Georgia's two Senators, who have been staunch backers of that state's county unit system, suggesting its revision. They said they did so because they feared it might otherwise be held invalid by the Supreme Court, although the Court in fact has several times refused to deal with the problem, terming it a political question. I think the Senators are really moved by politics, but their perhaps not wholly ingenuous tribute to the power of the Court seems to me to argue for exercise of the power.

The Court's Role . . . A Working Partner

We must realize also that constitutional adjudication today is as likely as not to be an interplay between Court and legislature, with the Court serving as a goad rather than as a body of final veto. In the passport cases of last term the majority talked of a constitutional right to travel but rested on the finding that Congress had not authorized denial of passports because of suspect associations. In effect the Court told Congress: If you want to withhold passports for reasons of this character, you cannot legislate by vague implication; you must deal with the problem explicitly, having due regard for the

(Continued on page 990)

What Hath Wimble Bought:

A Short Course on the Law of Oil and Gas

by **H. J. Prendergast** • ***of the Texas Bar (Corpus Christi)***

In this article, Mr. Prendergast discusses the various types of interests in oil and gas lands, explaining the difference between "royalty interests", "mineral interests" and "working interests". He goes on to compare these technical terms, pointing out, among other things, that a "one-eighth mineral interest" is exactly the same thing as "one eighth of the minerals", while a "one eighth royalty interest" is eight times as large as "one eighth of a royalty interest".

Wesley Wimble, president of one of the large local industries and a very important client of yours, has just seated himself in your office across the desk from you, opening the conversation with the following, thinly veiled, sarcastic remark:

"You're my lawyer and are supposed to know these things. I'm going to buy an interest in some oil property, or leases, or wells—I don't know which yet—but I want you to look over these papers and tell me what you think about the deal."

Wesley goes on to explain the financial side of the venture he is about to embark upon. He's not interested in your financial advice, however, but does want to know exactly what it is he is about to purchase—if the transaction is completed. Across your desk he hands several legal-appearing instruments which Wesley assures you constitute the interests he's acquiring and which, upon being given a cursory glance by you, certainly appear to be referring to oil and gas interests.

"All I'm interested in", says Wesley, as he heads for the door, "is what I'm going to get, nothing else."

You, being a practitioner in an area where there is no oil and gas production, are almost totally unfamiliar with "mineral interests", but, as Wesley Wimble says, you're supposed to know everything, so it's up to you to find out, if you don't know already, what it is that Wimble is buying. Beginning at the beginning, you read the papers which Wimble left with you and find that there are apparently three separate transactions involved, each similar in its terms, except for the interest Wimble receives.

In the first transaction, Wimble is purchasing a "royalty" interest; in the second, a "mineral" interest; and in the third, a "working" interest. Since these terms could be Hindustani for all you know about them, you sharpen a handful of pencils and reluctantly head for your library.

To ease the pain of your research and to give you a working knowledge of the interests most commonly bought and sold in the oil and gas industry are the goals of this "short course" in oil and gas. It will also help to sustain the belief of your clients that you indeed do "know everything".

Royalty Interests

A royalty interest is a share in the minerals produced from a tract of land. It usually amounts to one eighth of the total production and is free and clear of any and all development costs. When executing a mineral lease, the lessor reserves a royalty interest, which is generally held to be a part of the consideration for the execution of the lease. Since royalty is a portion of the production, no royalty is due until production is obtained; and, if production, which has been obtained, ceases, the royalty also stops.

Royalty may be either perpetual in duration or for a term of years. If it is perpetual, the owner will receive his proportionate share of the mineral production whenever it occurs. However, if the royalty interest is for a term of years or terminates upon the lapsing of an existing mineral lease, the royalty ceases at the end of its term and reverts to the then fee owner of the reversionary mineral estate.

Mineral Interests

A mineral interest is a share in the minerals, if any, as they exist in the ground. It could be compared to an undivided interest in a tract of land in

H. J. Prendergast is a member of a Corpus Christi law firm. A native of Minnesota, he is a graduate of the University of Houston (LL.B. 1955). He was a paratrooper in World War II.

that it is an interest not depending upon the happening of an event, *i.e.*, production.

An interest in the minerals may be "participating or non-participating", "perpetual" or for a term of years. Participating means that the owner has the right to execute mineral leases covering his interest, with the attendant right to share in bonuses (money paid to the lessor for the execution of a lease) and delay rentals, in addition to his proportionate share of any royalty. A non-participating interest does not have executory rights nor does it share in the bonuses or delay rentals. It is not unusual to find mineral interests which are fully participating, except as to executory rights, which means that the owner has no right to execute or join in a lease covering his interest, but does share in the bonuses and delay rentals.

The mineral interest owner shares in the royalty in direct proportion to his mineral interest; that is, if he owns one sixteenth of the minerals, his share of the royalty will be one sixteenth of whatever royalty is provided by the lease terms (which as stated above is usually a one-eighth royalty and therefore the mineral interest owner would receive one sixteenth of one eighth, or a one/one hundred twenty-eighth, royalty).

Working Interests

Upon the execution of the usual oil and gas lease, the lessor retains one eighth of the leasehold estate (royalty) and the lessee receives seven eighths of the leasehold estate as his interest. This interest of the lessee is known as the "working interest".

The working interest owner is the developer of the leased premises. Since the cost of development is high this interest is frequently divided between several parties and they all become working interest owners operating the leasehold together. Each working interest bears its proportionate share of the operating expense and receives its proportionate share of the profits. Of course, only seven eighths of the production is subject to production costs, since the royalty is cost-free, and therefore only seven eighths of the production must produce the profits, while at the same time it must bear all of the costs of producing eight eighths of the minerals. This is one of the drawbacks of being a working interest owner.

Comparison of Interests

A royalty owner's interest costs him nothing after acquisition. He thereafter shares in any production and may just sit back while the postman delivers his royalty check, his only worry being whether or not he will recoup his original investment plus a fair return on the principal he has invested.

The mineral interest owner, assuming for discussion purposes that his interest is fully participating, shares not only in the royalty in proportion to his interest, but also in the bonuses and delay rentals. He must also execute or join in a lease covering his interest. If he does not execute a lease, he will not share in the bonus or rentals, and in order to share in any production obtained, he will have to bear his proportionate share of the development expenses before he is entitled to share in the profits. He, in effect, becomes a working partner, which may or may not be to his detriment, depending upon his financial condition and the productiveness of the well.

The owner of a working interest is the one most likely to be saddled with an expensive, money-losing, operation and therefore this type of mineral ownership should be purchased with extreme caution. On the other hand, it is also the one which has the highest potential return on the investor's outlay. Therefore, this interest above all others should be thoroughly explained to the potential buyer, since investment risks are usually much greater where a working interest is concerned.

It is also important to understand the exact language used when the purchaser acquires his interest. For instance, a one eighth royalty is not the same as a one eighth of the royalty. In the first instance, the royalty is one eighth of the total production. In the second instance, the royalty equals one eighth of whatever royalty is provided for in the lease, *i.e.*, in the usual lease the royalty is one eighth; therefore the interest in the second instance would be one eighth of one eighth, or one/sixty-fourth royalty.

Nor is a one-eighth royalty interest the same as a one-eighth mineral interest. In the latter, the royalty interest under the usual one-eighth royalty lease would only be one eighth of one eighth, or one/sixty-fourth, royalty. Therefore, it is extremely important that the words of grant in a mineral conveyance be understood and correctly used, since it would be a capital error to purchase a "one-eighth mineral interest" expecting to receive a "one-eighth royalty", and, when a producing well is drilled, be rudely awakened to the fact that all that was acquired was one eighth of the royalty.

To further confuse the picture, it might be pointed out that a fractional "mineral interest" and a fractional interest "of the minerals" are interchangeable terms, unlike the terms "royalty" and "of the royalty".

This article does not purport to be an analysis of the entire oil and gas field. Tax aspects, partnership responsibilities, tort liabilities, and so on, as they affect the interests discussed are not meant to be within the purview of this brief analysis. It is meant only to acquaint the non-oil and gas general practitioner with several of the more obvious interests which are currently being purchased and sold in the oil and gas industry. It is hoped that the discussion has not served to compound the confusion.

A Book Review:

What of "Permanent Peace"?

by **Eberhard P. Deutsch** • *of the Louisiana Bar (New Orleans)*

In this article, Mr. Deutsch frankly discusses the practical possibilities of permanent peace in the light of current thinking, including among others the recent suggestions of Tom Slick, of Texas, author of *Permanent Peace—A Check and Balance Plan* (Prentice Hall, Inc., Englewood Cliffs, New Jersey. 1958. $2.95. Pages 181.)

It would seem to go without saying that any intelligently conceived and executed treatise on ways and means of achieving permanent peace without surrender of national sovereignty, must find a cordial welcome in the minds and hearts of all of us.

"It is with this philosophy", says Tom Slick, the author of *Permanent Peace*—"that with enough thought and effort any individual might be able to make some possibly worthwhile contribution toward peace—that the preparation and writing of this book was undertaken."

Tom Slick has been trained neither as a lawyer nor as a diplomat, but he is a well-educated and exceptionally intelligent businessman, scion of a rugged Texas pioneering house, and every lawyer and diplomat would do well to read *Permanent Peace*, for which Slick submits a "Check-and-Balance Plan".

His objective—and no one can fairly disagree—"has now become an urgent immediacy, with the world faced now by the prospect of two great nuclear-armed war machines, each poised to destroy the other and, along with its enemy, very possibly civilization itself".

Slick submits that "there is no hope of permanently secured peace through mutual terror"; but he suggests that the temporary and uncertain reprieve provided by "the fear of horrors to be faced in the next war . . . must be urgently employed as a time of priceless value to find a more certain and dependable answer to the problem".

He insists that "balance of power diplomacy", whatever its past successes, is "too hazardous today when the powers to be balanced are so great that a single slip might precipitate a cosmic catastrophe".

And the author concedes that co-existence, even with disarmament, "cannot alone be considered an assurance of peace", and that "coexistence cloaking appeasement would be disastrous"; but he quotes Nehru of India, whom he recommends for leadership, with President Eisenhower and Dr. Albert Schweitzer, "toward world-wide acceptance of a suitable peace plan", as saying that "the alternative to co-existence is co-destruction".

There can be no question as to Tom Slick's condemnation of Communism and its proponents. He asserts, for instance, that the Communist power bloc "under the imperialistic control of Soviet Russia, has been the gravest threat to peace since the end of World War II".

But it is difficult to understand how the author can assert that Soviet Russia has "brought a large proportion of the world's population under her control" by indirect aggression, and that "not a single conquest was accomplished by the classical method of direct military attack", or that Russia's expansion of her sway over the satellite countries "was a conquest without the overt use of force".

There is discussion of the Suez crisis and even of the Korean conflict, and of the threats to peace which they engendered; but the puzzlement as to the author's declaration of Russian avoidance of "the overt use of force" is inevitably induced by the fact that, from front cover to back of the book, there is not a single mention of the name and shame of Hungary.

Nevertheless, the author very wisely stands on the premise that "what is needed is a *system* to assure peace, not the defeat of any one government or nation".

Slick acknowledges himself to be indebted for most of his ideas to Grenville Clark and Louis Sohn, whose *World Peace Through World Law* he has used as a guide for his own plan; and he also praises highly the work and expressed aims of the United World

Tom Slick

Federalists, who, he says, are in basic accord with his plan for peace.

This latter position might conceivably condemn Slick's work, but he attributes the Federalists' advocacy of a world government to "an earlier radical wing which tended in this direction". He himself rejects any concept of a world state, to which he "objects strongly", and which he concedes "would be entirely unacceptable to most of us".

"In fact", says the author, "the popularity of *nationalism* and the unpopularity of *internationalism* are both so great that the epithets of 'one-worldism' and internationalism, have become almost synonymous with impractical and visionary dreaming"—"what we must have is a plan which [so] interrelates these conflicting elements of nationalism and internationalism" as "to protect the other factors in which we have such a vital interest".

Slick nevertheless feels that it is essential "that at least a limited area of authority and sovereignty be turned over for primary control" to an international peace enforcement body, but this "turnover" must be "confined to those elements concerned with the prevention of international agression and war", while "all other elements of sovereignty should be retained under national control".

A Bill of Rights . . . National vs. Individual Rights

Quite interestingly—if not remarkably for a layman—the author, in this connection, insists that a plan for peace must incorporate a bill of rights "as difficult to amend as the American Constitution", guaranteeing retention of all national rights, "while at the same time assuring every citizen of the world community, that his proper basic individual rights as a human being would not be jeopardized by either national or international government".

It is not remarkable, and is certainly forgivable, that a layman should not understand the conceptual contradiction inherent in an international guaranty of national rights which also protects individual rights against national infringement.

Such a dilemma inevitably points up the difficulties confronting even the professional student of international law when he faces these problems.

Slick, a layman, may fairly suggest, as he does, that a rule of law must be provided to govern disputes which do "not clearly come under definite international law", and that "precautions have to be taken to permit future valid internal domestic change".

That is well enough, of course, in application to such traditional and literal borderline examples of national-international disputes, as have arisen, for example, in the case of Iceland's insistence on a twelve-mile seaward limit of her national boundary, as opposed to Great Britain's insistence on fishing rights in what she contends are international waters within that boundary.

But what of the demand in some quarters that such matters as human rights, traditionally regarded as involving the relationship between a state and its own citizens within that state's exclusive domestic jurisdiction, be brought under some kind of supranational supervision through international compact?

A 1950 State Department Publication (No. 3972, Foreign Policy Series 26), with a foreword by the President of the United States, opens with the statement that "there is no longer any real distinction between 'domestic' and 'foreign' affairs".

However, such fragile legalistic threads in Tom Slick's basic fabric for *Permanent Peace* merely require study, revision and correction. They do not detract from the fundamental merit of his plan, which clearly envisions an intentioned retention of national sovereignty, as already shown.

This result is to be achieved, says the author, by a "system of checks and balances"—through a solution "that historically was found to a generally similar problem at the time of creation of the American Constitution".

Concluding that "wherever there is force, there is also a potential danger, unless it is properly checked and balanced", Slick recognizes that it is necessary to maintain continuously a system of checks and balances between nations, as well as between national and international forces, "during, as well as following, disarmament".

Disarmament, as it inevitably must, forms the foundation-stone of *Permanent Peace*—"disarmament down to those minimum levels necessary for domestic and international policing purposes".

But to provide checks and balances, the author insists "that no existing deterrence defense measures should be lessened until the system of collective security is completely working and beyond hazard"; and he understands that "extensive disarmament alone without a substitute system of peace enforcement machinery", might well prove to be "suicidal".

Coordinated with the proposed disarmament program, would be "a step-by-step reduction of nationally controlled nuclear weapons", with a "strictly limited number of such weapons" in the hands of an International Police Force.

One suggestion by Slick is for storage of those atomic weapons retained by the United Nations, in separate stockpiles held in various countries, "guarded and supervised by the International Atomic Energy Agency", whose resultant absolute power over the world is to be avoided by holding this nuclear materiel "under conditions which guarantee against illegal usage as far as human ingenuity can assure".

The author then proposes, somewhat alternatively, an elaborate "mechanical, human and legal" guardianship of nu-

clear stockpiles, under United Nations control, perhaps in the "isolated ice thickness of the Antarctic Continent".

Access to these areas, "through minefields and death-dealing traps of every type", could not be gained except with information "available only in an ingeniously coded set of instructions, the two halves of which would have to be fitted together to be deciphered. One of these halves would be lodged in the safekeeping of the Commander-in-Chief of the International Police Force; the other would be guarded by the World Court."

In addition, "two other carefully guarded electronic 'keys' held in the same manner would also be required to open the storage area". Any attempted trespass would set off an atomic explosion, and any further attempt to break into the area "would automatically blow up and destroy the entire stockpile".

The author recognizes that many authorities consider "that the whole problem of inspection and control has become completely hopeless", but he nevertheless believes "that under the proper circumstances an effective conventional armament inspection and control system in all probability could be developed".

The author's own misgivings, however, seem to find expression in his pious thought that "an ideal situation would exist if all nuclear and similar inhuman weapons could, at the proper stage of the disarmament program, be completely and forever eradicated from the earth".

Military Forces . . . Divided Power

But the main impact of Slick's system of checks and balances for the achievement of international peace, with retention of full national sovereignty, is found in his proposed division of military forces between an International Police Force, International Reserve Forces and National Forces.

He suggests that the International Police Force should constitute not more than 10 per cent of world military forces, should be a professional standing army under exclusive international control, composed of volunteers who enter the service as a career and owe their allegiance to the world community "above any national loyalty".

The International Reserve Forces would constitute some 40 per cent of total world military forces, would be organized in national contingents, and would remain in their countries of origin until called into action (on narrowly restricted authorization) under international control.

The National Forces, comprising 50 per cent of all world forces would balance any possible excessive international strength, would serve for national defense in each country, and would be available; on a volunteer basis, to increase the strength of the International Police Forces, only under "extreme emergency conditions".

These military forces would be employed under a system which the author denominates as "Graduated Reactive Force", to "provide an additional check against the danger of excessive international power and thus assure the provision of justice alongside of strength".

For "preventive action", the International Police Force would move into position, following demand for arbitration of an international dispute, on authority of the standing Peace Committee of the United Nations.

In the event of "international agression", the International Police Force would be permitted to take local and limited defensive military action, subject to immediate authorization and review by the Security Council.

An "international emergency" could be declared by majority vote "in new veto-proof form" of the Security Council, in cases of aggression with refusal to arbitrate, with authority for all-out attack against the aggressor by the International Police Force, supplemented by all or such part of the International Reserve Forces as may be called up by majority vote of the Security Council and of the General Assembly, "subject to subsequent review and opinion of the World Court".

Finally, in the event of a "world crisis", threatening full-scale world war, on a two-thirds vote of the Security Council and of the General Assembly, together with approval of the World Court, the National Forces would be committed voluntarily to fighting alongside the International Police Force and the International Reserves, with authority to use every kind of force, "including Prohibited Weapons, until the aggressor is defeated and the aggression is corrected".

Eberhard P. Deutsch practices in New Orleans. He received his legal education at Tulane and was admitted to the Louisiana Bar in 1925.

Of especial significance seems to be the suggestion of proposed elimination, from the functions of the Security Council, of the veto, which would otherwise "stand in the way of effective action against aggression".

This proposed elimination of the veto would be checked and balanced by a "more realistically proportionate voting power in line with responsibility", which "could be done by a weighting procedure, that takes into account such key factors as population, degree of education, national products, etc."

This latter concept is taken, generally, from Clark and Sohn, who give a suggested table of weighting factors; but Slick carries it further with the intelligent suggestion that "advantageous authority and undesirable responsibility should be weighted equally", so that "a populous but poor nation could contribute a proportion-

ately larger number of troops or raw materials" and "proportionately less money or weapons".

Throughout his book, Slick indicates a tendency toward over-confidence in the efficacy of the United Nations and its agencies. For instance, he suggests that the latter "are worth studying for the way in which they work and their freedom to operate".

Each of the national delegations to at least one of these agencies is required to be composed of representatives of management, labor and the public. This agency has been unable to function as intended, simply because the Soviet bloc delegations are made up exclusively of government representatives who have no point of view whatever related to either management, labor or the public as such.

The United Nations . . . The Key Element for Peace

The author nevertheless seems to foresee such problems. He concedes that "the United Nations, as presently constituted, cannot be relied upon as the main bulwark of world peace"; but, he submits, it is "probably the key element of any future over-all successful peace plan".

Slick's plan envisages giving to the United Nations, as an international peace-enforcement authority, sufficient power and strength, "to enforce peace in a manner to assure safety and justice". This, he says, requires only one essential change in the United Nations Charter—"to remove 'action against aggression' from veto blockage".

The author foresees the likelihood "that Russia will strongly oppose any peace plan other than their own present limited and inadequate 'propaganda' proposals for disarmament". He suggests that "in this case, without the participation of the Soviet bloc, we should establish an alternate, temporary peace program in the form of a Peace Enforcement Agency outside of the United Nations and free of the blocking Soviet veto, but, at the same time, closely related to the United Nations in planning".

There may well be merit to Slick's thought that "the answer to Russian opposition might be symbolized by the old folk tale of moving the obdurate and stubborn donkey by dangling a juicy carrot in front of its mouth while applying a hefty whip vigorously to his hind quarters".

He suggests that beating a path around Russian intransigence may necessitate "finding the proper answer to the satellite problem", a possible compromise of which might involve American agreement "to the Russians' retaining certain advantageous defense and trade positions in these countries together with United Nations trusteeship control over them for a period of perhaps ten years, after which there would be a valid, United Nations-controlled plebiscite to allow the people to determine their own future".

"As the Peace Enforcement Agency became established and began to have substance and great strength, it is almost inconceivable" to the author "that any Russian government, faced with such a strong and righteous grouping of a combined moral and military force composed of most of the rest of the world, could long continue to be an international pariah by refusing to join the peace program."

"It would almost certainly be only a matter of time", Slick submits, "before Russia's acceptance would make it possible to transfer the 'independent' Peace Enforcement Agency to a United Nations so reorganized as to make it the proper home for the world's first effective program to assure permanent peace".

Throughout Slick's treatise flows what, for a layman, is again a remarkable appreciation of the legally ordered fitness of things: "It is essential for permanent stability in the long run", he says, "that, along with political organization on an international basis, there should be the parallel development of a broadened system of international law and justice."

It may be that the author's expressed hope for an ultimate "Rule of Law" in the world, comparable to the United States "Supreme Court legal system wherein specific decisions gradually codify into comparatively rigid law", contains a more optimistic—if not more naïve—innuendo than even his hope for permanent peace itself; but no lawyer can fail to admire, and to concur in, his lay dictum that "as force and the threat of force are removed as mechanisms of international decision, some substitute mechanism for settling disputes must be provided, or international anarchy will result; and as any international body is given authority to exercise force, this exercise of force must be controlled by provisions to assure appropriate justice and equity".

As an especially tempting post-prandial savory to the author's peaceful repast, he offers a résumé of the "Rewards of Peace" purveyed primarily out of diversion of half of the vast sums being expended on military establishments, through a World Betterment Fund, to provide higher standards of living all the way from intensified scientific research, to rendering inert the "'P bomb', as they have referred to uncontrolled population increase".

The other half of the sums saved by world disarmament would be "returned to the taxpayers in the form of reduced taxes", although it is not clear as to just how this would be accomplished in Communist countries.

Similarly difficult to understand is the author's suggestion of a change in method of selection of delegates to the United Nations, from present appointment by national governments, to "popular election in their countries". One cannot help wondering how this would mean change at all in totalitarian states.

But it is not at all difficult to understand the author's recommendation for formation by the President, under congressional authority, of "an organization for basic peace-planning studies, similar to the Committee for Economic Development . . . often popularly referred to as a *Think Committee*".

To the abundant lawyers' treatises of the past decade, dealing with efforts to effect international reform by treaties, a forceful legal question has been raised as to constitutional validity in the United States, of the basic provisions of such international agreements.

But Tom Slick, in *Permanent Peace*, meets these objections head-on, with a layman's proposal which can find no legal impediment, and must, in fact,

(Continued on page 984)

The Doctrine of *Stare Decisis:*

Misapplied to Constitutional Law

by **Hamilton A. Long** • ***of the New York Bar (New York City)***

Mr. Long believes that the Supreme Court has departed from the intention of the Founding Fathers in its post-1936 policy of constitutional interpretation. The source of the error, he writes, lies in misapplication of the *stare decisis* policy of the common law, which, being judge-made, is subject to change by court decision, to constitutional law—based on the Constitution, which is made by the people and can be changed only by the people themselves through the amending process.

An ancient adage says that the people must from time to time refresh themselves at the well-springs of their origin, lest they perish. This truth regarding any nation has been expressed in the more familiar motto that we must periodically return to first principles; we must re-orient ourselves to make sure that our nation's course is sound.

The present period appears to be a time of grave need for our doing this with regard to our constitutional system of government. The constitutional crisis with which America has been confronted for a quarter of a century cannot be solved soundly unless the American people, and especially the legal profession and the judiciary, regain a clarified view of the fundamentals underlying our traditional philosophy of man-over-government, and of our system of constitutionally limited government through which that philosophy was given governmental expression in 1787-1788.

One of the guide-posts in this regard is this precept: the sovereign people create their government to make secure their God-given unalienable rights, as the Declaration of Independence proclaimed. They made their basic law, the Constitution, to this end and only the people can change it—by amendment. Their public servants, government officials, are without any power or authority to change it. This was clearly understood in the days when the American people were fighting the Twin Revolutions of 1776: against royal rule and against government-over-man; and equally so when the Republic was being created in 1787-1788. As Alexander Hamilton wrote in 1788 in *The Federalist*, No. 53:

> The important distinction *so well understood in America* between a constitution established by the people and unalterable by the government; and a law established by the government, and alterable by the government, seems to have been little understood and less observed in any other country [italics added].

One striking piece of evidence of such popular understanding will be of special interest here. Even before independence was declared, there was a pronouncement from a "grass-roots" source in May, 1776, which illustrates Hamilton's point here. This was in a town-meeting petition of Pittsfield, Massachusetts—in frontier Berkshire County—penned by the Reverend Thomas Allen, leader of the Berkshire Constitutionalists, demanding a constitution for the governance of the people of Massachusetts. This was most advanced thinking, eleven years before the Federal Convention met in Philadelphia; yet the profound governmental significance of a genuine Constitution—a basic law of the people made by them and changeable only by them—was well understood by this clergyman and his fellow constitutionalists. This is all the more impressive by reason of the fact that this was a uniquely American concept—nothing like it had ever been adopted—even proposed—by any other people in all history. This town-meeting petition put the main points briefly, in these words:

> We beg leave, therefore, to represent that we have always been persuaded that the people are the fountain of power; that, since the dissolution of the power of Great Britain over these Colonies, they have fallen into a state of nature.
>
> That the first step to be taken by a people in such a state for the enjoyment or restoration of civil government among them is the formation of a fundamental constitution as the basis and ground-work of legislation; that the approbation, by the majority of the people, of this fundamental constitution is absolutely necessary to give life and being to it; that then, and not till

then, is the foundation laid for legislation . . .

A representative body may form, but cannot impose said fundamental constitution upon a people, as they, being but servants of the people, cannot be greater than their masters, and must be responsible to them; *that, if this fundamental constitution is above the whole legislature, the legislature certainly cannot make it;* it must be the approbation of the majority which gives life and being to it . . .

That, knowing the strong bias of human nature to tyranny and despotism, we have nothing else in view but to *provide for posterity against the wanton exercise of power, which cannot otherwise be done than by the formation of a fundamental constitution* [italics added].

These few paragraphs sum up largely our American philosophy of government; and they were expressive of "grass-roots" thinking in those days—in frontier country, be it noted.

Not only does the legislative branch (as well as the executive, of course) have no power, under our constitutional system, to alter the people's basic law, the Constitution, but the judiciary is equally powerless in this regard. This, too, was equally well understood not only by leaders but by the people at large in the days of the formation of the Republic. This was reinforced, moreover, by powerful feelings against any idea of judges being able to dominate the people, as had the King's judges before 1776—a part of royal tyranny which produced the Revolution.

The proper role of the judiciary, in relation to the Constitution, was the subject of widespread popular writing and discussion as a prelude to its ratification—for example, in the *Federalist*, written in 1787-1788 by Hamilton, Madison and Jay seeking to arouse support for ratification—notably Numbers 78-82 about the judiciary. It should be kept in mind, furthermore, that these essays were written as a report of the true meaning of the Constitution as intended by the framing convention; and they have been accepted as authoritative in this respect by all competent to judge, including the Supreme Court in scores of cases during the century and a half from 1790 to 1937.

The Role of the Judiciary . . . Strictly Limited Review

The historical records prove that it was taken for granted in the Federal (framing) Convention and in the State Ratifying Conventions in 1787-1788 that it would be the duty of the Supreme Court to pass upon disputed questions arising under the Constitution; for instance, as made expressly clear by the remarks of John Marshall in the Virginia Ratifying Convention.[1] But it was equally well understood that the judiciary would have the strictly limited role of ascertaining from the records, defining and applying the meaning of the Constitution as intended by those who framed and adopted it. If the preposterous idea had been advanced seriously — impossible, of course, among such sound men—that the Supreme Court would in effect have the power of changing the Constitution by "interpretation" different from, or in conflict with, that original intent and meaning, this would have been called the wild talk of a scatterbrained fool and he and his idiotic talk would have been dismissed summarily. No one then entertained any such anti-limited-government notion, of course.

The Supreme Court ruled on this point, of the judiciary's lack of power to change the Constitution by such "interpretation", in a number of decisions during the generations from 1790 to 1937; and their pronouncements were consistent and clear. (It was in 1937 that the Court broke with precedent in this regard and started a new policy of "reverse interpretation" in defiance of the original meaning of the Constitution, as amended, and in defiance of all of its own decisions which had ascertained and defined that meaning in line with the intent of those who had framed and adopted it.[2]) Especially noteworthy are the Court's remarks in the *Dred Scott* case in 1856—60 U.S. 393, at 426:

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when this instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.

The Court also said that the Constitution not only speaks with the same meaning and intent as it did when adopted but must always be so construed by the courts because:

> Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.

As late as 1936, in the *Carter* case, 298 U.S. 238 at 318, Chief Justice Hughes, in his separate opinion (concurring with the majority), confirmed this principle:

> If the people desire to give Congress the power to regulate industries within the State, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.

The soundness of this principle is more apparent when one considers that the power to make carries with it the power to change (even to the point of destruction), and that this power is exclusive in each of the three categories: constitutional law, statutory law and common (judge-made) law. In other words, only the people can make, and only they can change, their fundamental law, the Constitution; only the legislature can make, and it alone can change, statutory law; and only judges can make, and they alone can change, the judge-made rules called common law. These three fields are mutually exclusive. It makes no difference, for present purposes, that the statutory law can override the common law and that the Constitution is supreme over both of them.

Under our constitutional system, the

1. Elliot's DEBATES, in the state ratifying conventions, Volume II, page 404.
2. The proof that there was no such pre-1937 Court policy is presented in the author's 1957 study: *Usurpers—Foes of Free Man*, reviewed in the October, 1958, AMERICAN BAR ASSOCIATION JOURNAL [Post Printing Co., 18 Beekman Street, New York 38; price $1.00].

Supreme Court's proper role and authority of construing the Constitution to settle disputed points of constitutional law does not give it any authority to make its WILL supreme but only to use its JUDGMENT—in studying the records, to ascertain the original intent with which it was created, and then defining that intent accordingly with intellectual honesty. This is an objective process, not merely a matter of gyrations within the judicial mind. Hamilton's remarks in this connection, in *The Federalist*, No. 78, are of special interest (after he had said that the Constitution overrides legislative acts):

> The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges distinct from that body.

In this same No. 78, Hamilton observed also that neither popular demand, nor legislative action, violative of the Constitution's provisions could properly be permitted to sway the courts from their obligation (that is, to adhere to the Constitution's true meaning as originally intended); and that every action of a delegated authority in conflict with the Constitution is void.

A main source of confused thinking today comes from the unsound practice—among Bench and Bar—of incorrectly borrowing from the common law, and misapplying in the field of constitutional law, the Latin words, *stare decisis et non quieta movere*, more commonly referred to by the shorter, *stare decisis*. It means adhere to prior decisions and do not disturb settled points. For centuries, this has been found by judges in this country and Great Britain to be a sound judge-made policy in the field of judge-made law, called common law. It lends stability to decisions, on the basis of which the people conduct a considerable part of their affairs. It applies only to situations involving similar facts and issues.

This judge-made common law policy is, however, flexible. It permits judges to change their minds regarding common law rules—to change the rule or its application— if, in their opinion, the ends of justice will be served by so doing in a particular situation under consideration. This flexibility, this privilege—which judges allow themselves under their self-made policy of *stare decisis*—is an essential and inseparable element of the policy.

The trap involved in using this term *stare decisis*, in order to indicate the idea and desirability of adhering to judicial precedent, lies in the fact of its dual nature; it also carries with it necessarily and inescapably the connotation of flexibility, of the judges having the power to change their minds and change their rules, if desired. This latitude is, of course, necessary and proper in common law—it is inherent in the power of those who made the *stare decisis* policy or rule: the judges themselves. It has no place, however, in the field of constitutional law, when the judges are ascertaining from historical records, defining and applying the true meaning of the Constitution—that is, the original intent with which it was framed and adopted. This applies to each amendment as well as to the original Constitution.

The term *stare decisis* cannot soundly be used separate and apart from its dual nature mentioned above, its twofold meaning. Therein lies the reason why it is improper to try to use this term, in only its partial sense of respecting precedent (sometimes, but not always), in the field of constitutional law; because in situations involving the meaning of the Constitution—controlled by what the records prove to be the unchanged and unchanging intent of those who framed and adopted it—there can be no leeway for judicial discretion as to what that intent and meaning were originally and are now. As the Supreme Court said in the *Dred Scott* case, any suggestion that the Court might say that the Constitution has a different meaning is inadmissible —no matter what the judges' feelings may be or what public opinion may favor.

The solution, to facilitate clear thinking and expression, in connection with these Latin words *stare decisis*, is to quit using them concerning matters in the field of constitutional law and confine their use entirely to discussions of common law. When it is desired, with respect to constitutional law, to indicate the idea of respect for precedent or related concepts, simply use English words and avoid that confusing Latin term. Habit and love of Latin phrases among lawyers and judges may make this trying, but the gravity of the problem of restoring clarity of thinking and soundness of action on constitutional subjects—in the present constitutional crisis endangering the very foundation of the Republic—makes it imperative that the widespread abuse of the term *stare decisis* concerning these subjects be ended. This means, in part, putting an end to the empty excuse proffered all too often—for the Supreme Court's policy of "reverse interpretation" of the Constitution started in 1937, in truth its anti-Constitution policy: that it is justified by the rule of *stare decisis*. Such talk evidences either incompetence or intent to confuse others.

Hamilton A. Long is a 1924 graduate of Columbia University Law School. Admitted to the New York Bar in 1925, he practiced in New York City prior to World War II. He is a veteran of both World Wars, having served in the Field Artillery in 1918 and as a major in the Air Corps in 1942-1944. Since then, he has devoted his full time to research, writing and public lecturing, largely in the fields of American history and constitutional government.

The fact that the *stare decisis* policy of judge-made common law is limited to common law is indicated in *Carroll* v. *Lessee of Carroll*, 57 U.S. 275, 286 (1853), and *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U.S. 673 (1930), footnote, page 681, where it is referred to as a common-law policy, meaning a judge-made policy. In *Dimick* v. *Schiedt*, 293 U.S. 474 (1935), the Court clarified the foregoing point about the *stare decisis* policy's flexibility not being applicable in the field of constitutional law, in construing the Constitution, by saying at page 487:

> It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. *Funk* v. *United States*, 290 U. S. 371. But here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Limitations, 8th ed., 124.

In the above-quoted passage from Cooley, here cited by the Court, he stresses at pages 123-4 that it is a cardinal rule that a uniform construction, or interpretation, be given to the Constitution in keeping with the people's intent in adopting it—not changing the construction with changing times, as would be permitted to judges administering the common law. Judge Cooley also says, speaking of constitutions, ". . . there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law". He further observes that, whereas common law rules change to suit changing times, in the discretion of judges, to meet changing conditions and needs, this is not true as to a constitution—regarding which he adds:

> What a court is to do, therefore, is *to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it [italics Cooley's].

The needed flexibility in our constitutional system, under the people's basic law, the Constitution, is provided by the provision for its amendment at any time in any way they may desire—even to the point of its abolition. The impatience of some with the "slowness" and the "cumbersomeness" of this amending process—so frequently expressed by those who do not give adequate consideration to the problems of constitutionally limited government as a whole, to the problem of the reconciliation of government with liberty, or by those who merely choose to by-pass the amending process to achieve their own aims at the expense of the people's exclusive prerogative of changing their basic law—is in keeping with the philosophy and system of rule-by-man instead of rule-by-law, meaning fundamentally the people's basic law, the Constitution. Those who seek to by-pass the amending process to get their way in a hurry, or so act because they think the people would refuse to sanction the desired change if submitted by way of a proposed constitutional amendment, thereby evidence sympathy for *rule-by-the-élite* under a despotism—benevolent or tyrannical. The anti-moral precept, that the end justifies the means, underlies all such attempts to by-pass self-government's safeguards under constitutionally limited government, to make a nullity of the amending process.

In any event, this is anathema to true friends of liberty of man *against* government-over-man, under a Constitution which could safeguard in actual practice the people's liberties only if respected in all its parts by public servants, especially the judiciary, faithfully adhering to their oath of office to support it and not to by-pass, undercut, or otherwise flout it. Any such misconduct constitutes usurpation and when those guilty are on the Supreme Court the danger to the Republic and our liberties is all the greater. The truth of this is all the more evident when one considers the lesson of history pointed out in Washington's Farewell Address: that usurpation is the customary weapon by which free governments are destroyed. Jefferson incessantly warned against the danger of the Supreme Court's undermining the rights of the states—expressly reserved under the Constitution's Tenth Amendment—which, he said, are the chief bulwarks of the people's liberties. A most effective statement by Samuel Adams, reflecting these views—in reality the opinion of a number of the leaders of that period as well as of many of the people at large—is as follows:

> I have always been apprehensive that through the weakness of the human Mind often discovered even in the wisest and best of Men, or the perverseness of the interested, and designing, in as well as out of Government; Misconstructions would be given to the federal constitution, which would disappoint the Views, and expectations of the honest among those who acceded to it, and hazard the Liberty, Independence and Happiness of the People. I was particularly affraid [sic] that unless great care should be taken to prevent it, the Constitution in the Administration of it would gradually, but swiftly and imperceptably run into a consolidated Government pervading and legislating through all the States, not for federal purposes *only* as it professes, but in all cases whatsoever: such a Government would soon totally annihilate the Sovereignty of the Several States so necessary to the Support of the confederated Commonwealth, and sink both in despotism [exactly as in original] [Letter to R. H. Lee in 1789].

This brief discussion is sufficient, it is hoped, to highlight the gravity of the problem under consideration here—a matter going to the root of the present constitutional crisis and not merely a minor question of intra-profession concern. It is of the essence of the major American governmental issue: rule-by-law versus rule-by-man; and the stakes are indeed in the highest possible bracket. They were defined in President Washington's First Inaugural Address in these challenging words:

> . . . the preservation of the sacred fire of liberty and the destiny of the republican model of government are justly considered, perhaps, as *deeply*, as *finally*, staked on the experiment intrusted to the hands of the American people [italics Washington's].

Some Legal Fiction:

Woe Unto You, Novelists!

by Edward J. Bander • *of the Massachusetts Bar (Boston)*

In this article, Mr. Bander takes to task contemporary novelists who choose to write about lawyers and the courts—the resulting portraits of the legal profession are almost always unflattering, he observes. His real quarrel, however, is with the authors' indifference to the law itself. Dickens, he points out, used legal background to illustrate the contemporary scene and expose its frailties. Today's novelist who writes a "legal novel" uses the law merely as a setting for chronicling the adventures (frequently amorous) of a hero that could as easily be a doctor, an engineer, or a real estate man.

For some time now, the American Bar Association and local bar associations have been alarmed by the abuse of their profession by radio, television and the cinema. Committees have been set up, newspapers have been alerted and the next portrayal of a lawyer on your TV screen may show him as a sweet-souled lawyer scorning his fee for the more adequate spiritual award. However, the guilt which these mass market media must bear for misrepresenting the legal profession is as nothing compared to the subliminal vilification of law and lawyers by present-day novelists.

The precedent, of course, is there. The Bible tells us, "Woe unto you lawyers", and Shakespeare did not lessen the glamour of the revolutionist Jack Cade when he had his friend, Dick the Butcher suggest, "Let's kill all the lawyers."

Rabelais, Fielding, Thackeray, Kafka, Balzac, Trollope and Dickens, some of these men trained in the law themselves, have found the lawyer an easy mark. Judges are portrayed as being so incompetent that they decide cases by the weight of the litigants' briefs; Mr. Bumble in *Oliver Twist* is every schoolboy's authority for the law's being "a ass". Lawyers like Jacques Ferrand and Dockrath see in clients only gain for themselves. Law firms like Quirk, Gammon and Snap or Dodson and Fogg (evil sounding names, eh what?) are treacherous and lecherous machines to entangle even the wary in the spidery web of the law. Many a work of legal fiction could be summed up by Mr. Dooley's view that a lawyer considers his share of a will all that the decedent could not take with him. It's quite a game and there is this to be said for it—some great novelists have succeeded in using the law as a stepping-stone to their success and current writers may be excused for recognizing a good thing when they see it.

They cannot, however, be so easily pardoned for the arbitrary, pretentious, impossible manner in which they portray the law and its servants. Individually, their best sellers amount to very little—quick acceptance, Book-of-the-Month (an appropriate title for some of the crimes committed in the name of fiction) and sundry awards and then the sudden death which soon makes a name like "James Jones" a quiz program stickler. However, their cumulative effect in the past few years has been agonizing to the poor conscientious day-to-day practitioner. What was said in 1887 (Willock, *Legal Facetiae*, page 1) applies in good part to our current crop of fictioneers: "To represent lawyers in a newspaper article, or in a novel, in an odious or ludicrous light, is as often as pleasant to the author as it is to a junior boy to get the chance of throwing a stone with impunity at one of the tyrants of the school." This is all well and good except that "junior boy" gets a spanking for expressing himself, while "writer boy" gets royalties. Not since the heyday of progressive education has abnormal conduct been so well rewarded.

A run-down of novels since 1955 that deal specifically with law should give some idea of what I mean.

J. G. Cozzens' best-seller, *By Love Possessed*, has the members of the respected law firm of Tuttle, Winner and Penrose involved respectively in dipping into trust funds, adultery and the seduction of clients. It is all in a day's

Jordan Marsh Co.

Edward J. Bander is Librarian of the United States Court of Appeals Library in Boston. A member of the Massachusetts Bar, admitted in 1951, he is a contributor to various legal publications. He is married and the father of three children, and as the reader may suspect after reading the article, he is writing a novel.

work, however, as these men have excellent backgrounds, are learned in the law and always carry off their indecencies like gentlemen.

In the *Philadelphian* we learn from R. P. Powell that it takes three generations to produce a Philadelphia Lawyer. The ingredients: the illegitimate offspring of the family maid and the law student son, a Latin scholar who thinks the word conjugate refers only to word structure and an opportunistic young devil who combines high law grades with retarded puberty.

In *The Great World of Timothy Colt*, L. Auchinloss pierces the law partnership veil. The villain trust lawyer and the idealistic corporate counsel (how times have changed) duel for supremacy in a large law firm. Timothy, whose practice included infidelity, eventually succumbs to the lure of money and winds up before a grievance committee.

The View from Pompey's Head is equally dismal—Mr. Basso's hero is a lawyer representing a publisher-client in a bit of detective work in the South. He finds himself in his old home town where he renews a childhood acquaintance which ripens into an affair-to-remember in the boring years ahead with his wife and children. A surprisingly good novel, although obviously all these things could just as easily happen to a visiting garbage collector.

In *Trial*, Don Mankiewicz' law school professor wanders into the world of trial practice and finds himself the dupe of a Communist plot to exploit minority prejudice. The usual contemporary love interest (*i.e.*, one involving infidelity, at worst, or, as in this case a premarital affair; it is an illness of mine to wish to see done a "modern" version of *Pride and Prejudice*) spices up this timely but contrived novel.

Ten North Frederick is about a lawyer who wanted to be President of the United States. This book is a good illustration of the fact that novelists do not consider the law such a jealous mistress. They invariably substitute a more worldly type—one more within their literate ken, perhaps.

The Prosecutor by Judge Botein is quite inadequate as a novel, but revealing as a portrayal of the politics and shenanigans that befall an honest D.A. who is trying to do a good job.

Robert Travers' *Anatomy of a Murder* is tedious with wisecracks by a small town ex-D.A., but an excellent book for first-year law students. There is an apparition of a plot, something that cannot be said for most of the above novels, but I suspect that it is sustained largely through its raw material—rape and murder.

Here we have the Devil's plenty. Except for *The Prosecutor* and *Anatomy of a Murder* (both written by judges) every major legal character is guilty of either fornication or adultery or both. All involve shapely women and even when in good taste cater to the present depraved appetite of fiction readers.

Apparently no modern day novelist worth his saltpetre can resist his *pièce de résistance*—a bedroom scene for his protagonist lawyer. It is getting so that a female who takes her novel-reading seriously will consider it ill-advised to be examined by a lawyer without a nurse being present. In all fairness to Travers (the pseudonym of a member of the Michigan Supreme Court), he does sterilize the sex aspect in a legal description of rape and thereby throws one somewhat off balance; and, in spite of the fact that his women are either wanted or wanting, he never involves them or the hero (a virile forty) in a non-legal posture. However, as Mr. Justice Holmes once so aptly observed in writing to his friend Harold Laski, "The new generation [of novelists] has discovered the act by which it came into being and is happy in the discovery." The *new* new generation, as Robert Fitch has observed in his *Decline and Fall of Sex*, is sophisticated beyond sex, reducing it to a mere whim—and devoting the greater part of the books to said reduction. As novelists more and more shrug at the sex taboos of Americans the more and more they write about them. The double paradox is that they have chosen lawyers—who they claim have written Victorianism into the statute books—to carry out their goal of making faithfulness a crime and chastity a crying sham.

The thorn in the real life lawyer's side is that these lawyer novels are so successful. If recent statistics on lawyers' incomes are correct, novelists do much better with the law than lawyers do. The law offers great drama, but it is certainly not captured by this lot of picaresque books. Plot is bare, when present; there are no significant characters (quick now, who is the hero of *Anatomy of a Murder*? or the lawyer—not Gary Cooper—who would be President?); and with pitiful exceptions, their sustaining power derives from the bourgeois trait of proving one's intelligence by knowing the sordid details of best-selling novels. But, aside from the absence of writing technique, what is missing most of all is an appreciation of the law.

These novels neither accept nor reject the law; it is not criticized and it is not acclaimed; it acts as a mere catalyst for the author's favorable and Freudian portrayal of sin and his method of striking back at the ordered society which the law represents and which he abhors. (The two judges' volumes only do I except from this observation.)

Probably the sharpest cleavage between the old and the new is indicated by comparing Judge Amsterdam, a

minor character of *Remember Me to God*, and one of Dickens' justices. Mr. Kaufman tells us that Judge Amsterdam had a heart of gold and a head of brick. Repetition of this theme certainly does not make a symphony of words. Not only that, but the significance of Judge Amsterdam was missed entirely by his creator. The occurrence of judges like Judge Amsterdam has always been a problem of government. The vexing problem of finding adequate, if not gifted, judges has been a troublesome problem since the formation of our Republic. Here was an opportunity to take a stand. Instead we are gagged with a way of life that Mr. Wouk and Mr. Wilson have already hard-covered *ad nauseam*.

On the other hand, compare the short scene which has Oliver Twist before Magistrate Fang. Dickens was not writing about justice or law in this novel, but he made each character serve his function—not just to be a stupid judge but to illustrate the contemporary scene and expose its frailties. The legal historian, William S. Holdsworth, thought enough of Dickens' writing to acknowledge that no one has recorded the legal atmosphere of England as well as Dickens. There is no current novelist about whom that statement can be made. Dickens, through Judge Fang, not only bares his anger at the arbitrariness of Justice in his time but makes, by this scene, the acts of such as the Artful Dodger plausible. The law never intruded in a Dickens' novel; it was as indispensable as Hardy's heath, as Faulkner's South, as Conrad's sea.

Unless the legal novel displays this trait the novelist is likely to be guilty of misusing the law. I maintain that this is the case with every novel I have mentioned, the only exceptions being where the author knows nothing more than the law, which is just as grievous a deficiency.

However, let us give the contemporary novelists their due. When they do write about the law they are accurate. They shower the reader with legal lore, they include abstruse terms and points of law that would send Mr. Tutt back to his hornbooks, they are very rarely caught in a legal error. I have often felt that Trollope, who could write better while sea-sick than any current writer I have mentioned, purposely made legal errors to keep the lawyers busy checking on him; Dickens, who apprenticed as a lawyer, had his slips, and Shakespeare made enough mistakes to dispel the theory that Bacon was the playwright. The substitution of intricacy and accuracy for depth and understanding is a pitfall into which even experienced lawyers have fallen.

The solutions to this problem are many. The urge to kill all novelists must be abandoned in deference to the great principles of freedom of speech as established by lawyers and jurists whose names are legion. Possibly the American Bar Association should agendize (why not?) fiction in their conferences on public relations of the Bar at its Annual Meetings. Lawyers could refer to the dedication in *Madame Bovary*, to the spirited defense of that book by an advocate, or to Judge Woolsey's famous opinion that made Joyce's *Ulysses* safe on our bookshelves. However I doubt that sentimental considerations would have the desired effect.

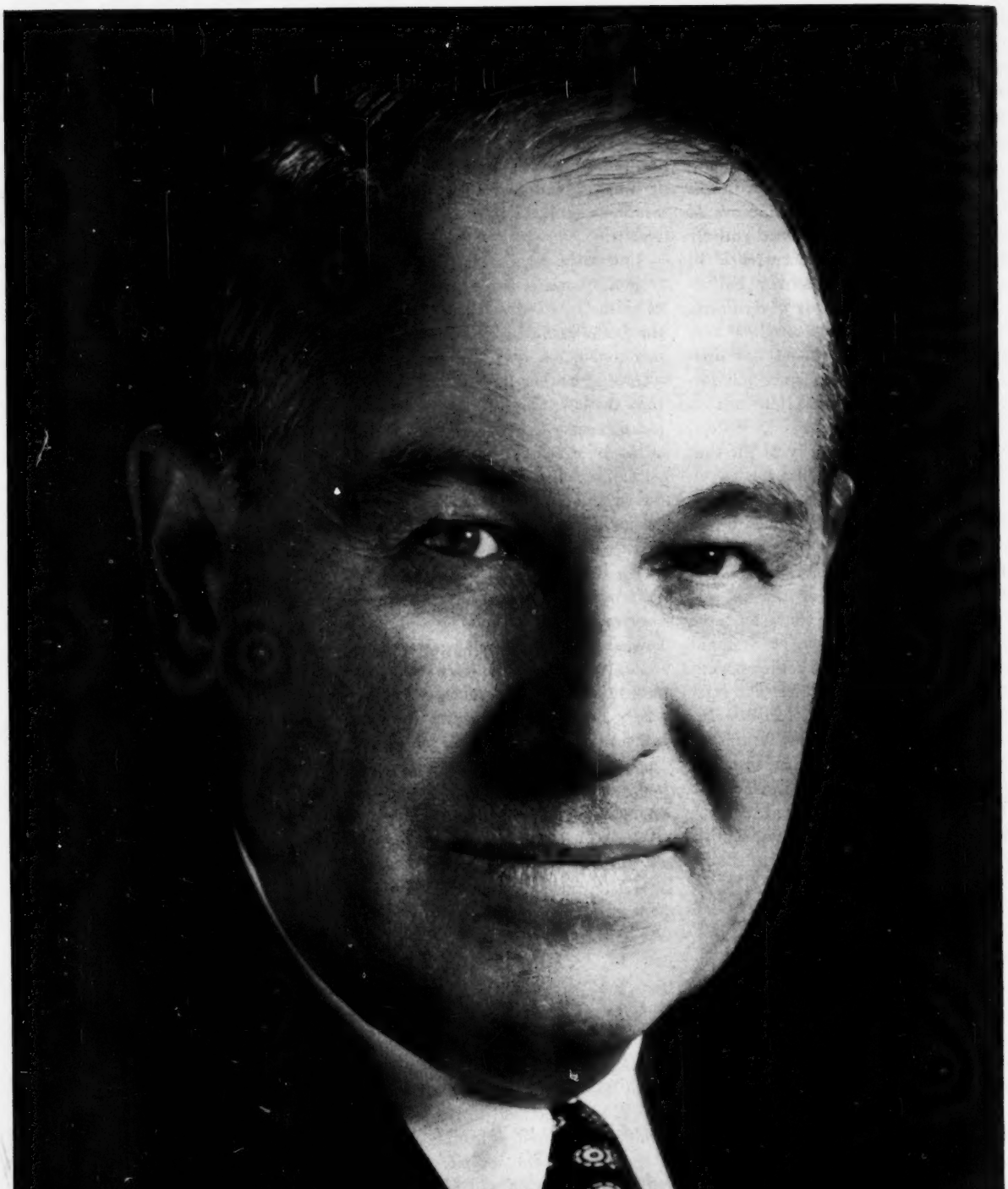
No, all I myself would ask of our creative brethren is that they lay the law to rest for a few years. Why not involve an engineer in an affair with his daughter's girl friend? Are doctor's immune from being duped by Communist causes? How about a good honest thief of a real estate man a la Cozzens' Mr. Tuttle? This is the challenge I throw to the writing profession. Here are professional fields that lie unfallowed for the imaginative mind—waiting for the novel approach.

Dates for the 12th Annual Institute on Federal Taxation at the University of Southern California School of Law will be October 28, 29 and 30. The meeting, which will be attended by more than 500 tax attorneys, accountants and life insurance underwriters, will again be held in Bovard Auditorium.

The planning committee has invited leading tax authorities, as well as persons prominent in the government service. to address the Institute this year. An announcement of the program will be made soon.

Planning committee for the Institute includes John W. Ervin, director; Louis M. Brown, Richard H. Forster, Arthur Groman, Sidney D. Krystal, Arthur Manella, Carl A. Stutsman, Jr., and Arthur B. Willis, attorneys.

For further information, communicate with Mr. Ervin at the Tax Institute, School of Law, University of Southern California, University Park, Los Angeles 7, California.



John W. Barry

John D. Randall

The President's Page

John D. Randall

As I undertake the work of the presidency of our Association, I appreciate the high honor which has been conferred upon me by my fellow lawyers. I am highly conscious of the responsibility which has been reposed in me. I am humbly grateful for the trust placed in me as a "country lawyer", practicing in a Midwestern town. What I may lack in background, I shall endeavor to make up through earnest effort and honest devotion to the task.

From the time I was a boy, I had always considered that the President of the American Bar Association had to be a Philadelphia Lawyer. As I undertake the work, I am not sure but what my earlier preconceptions were right. I am only hoping that an earlier notion that I have had is true, namely, that the position makes the man. I shall do my best.

In influence and in numbers, the organized Bar in the states and as an international organization is moving ahead. There is much still to be done. We must retain what we have. We must do more.

Since February, it has been my privilege to visit a number of bar associations. I was at the Chicago Bar Association to celebrate with it its 85th Anniversary. I attended the dedication of the State Bar Center erected by the voluntary contributions of over half of the lawyers who are members of the State Bar of Michigan. I joined with the members of the Montana Bar Association in the Annual Meeting in Great Falls. I enjoyed the hospitality and the inspiration of the Idaho State Bar at Sun Valley. On each of these occasions, I was impressed by the work which was being done by the organized Bar and by the individual lawyers in the public interest. These meetings have done me a great deal of good and given me an inspiration. As individualistic as we are in the legal profession, lawyers can work together, do work together, and by their joint efforts can make real progress for the public benefit. Different bar organizations have different needs, and it is amazing to see how much is being done by those who see the professional association as a service organization rather than as a social cause. Lawyers are gregarious and like to get together, but my conclusion thus far is that when they are working upon a real program, both their joy and enthusiasm are enhanced. We gain strength as we work together in fulfilling our responsibilities. The American Bar Association has been making a significant contribution to the cause of "World Peace Through Law". Charles S. Rhyne and his Committee have spared no effort to bring home to the American lawyer the possibility of "World Peace Through Law" and have carried on the cause for which one of our previous Presidents, Elihu Root, labored so diligently. This is a long-term approach, and there will need to be continued effort in order that the lawyers as well as the public may be acquainted with our aims and purposes in this connection. We have made a good start, but it will be necessary for a great deal of work to be done in order to accomplish our ultimate goal. Peace through law and the recognition of law by people within the country and by nations in their international relationships are the hope of the world. As discouraging as it may seem from time to time and as fruitless as international efforts may seem, the cause of peace and international brotherhood must move on if we are to exist.

Our efforts in promoting continuing legal education have been rewarding, but further work will be required before we can fulfill our responsibility to the public and to our brother lawyers. The Bar as a whole has responded to continuing legal education perhaps more than any other current movement. There is a reason for this. With the constant changes in the law and with the many new developments arising out of new activities in business, industry and Government, the educational process can never stop. The cooperation between law schools and the Bar is the most forward looking development of the day. It works both ways. The law schools gain by being brought closer to the reality of the profession. The members of the profession gain by obtaining the benefit of the scholarly lifetime efforts of those engaged in legal education. In my own state, and in most states throughout this country, the good coordinated activities of law schools, bar associations, legal institutes, clinics and workshops have benefited everyone—perhaps most of all the public.

The American Bar Center which we hoped would be spacious enough to house our activities for at least a decade is now overcrowded and we are planning an addition to it. We should also be pleased with this. It shows that there was a real need for the thing that we struggled so hard to get. We must unite to meet our future needs.

We hope that by the end of the next Association year we will have a membership of 100,000 members. Every member of the Bar engaged in the actual practice of the law wherever he is should be a member of the State Bar and the American Bar Association. A national bar association has a professional responsibility, and every member of the profession should share that responsibility.

The foregoing illustrates particularly our present situation. It is necessary from time to time for organizations as well as for individuals to stop and consider. We must consolidate our gains and prepare for future building. It would seem that during the coming year we should take notice of what

we have done, what we are doing, and what there is for us to do in the future, bearing in mind that as a profession, we are public servants and bearing also in mind that the purpose of the organized Bar is to enable the individual lawyer to be a better public servant. There is always a danger in the effort to do something new that we neglect the gains through encouraging the things we have already done. The newborn child often overattracts attention which should be spread among the other members of the family. We have done many things. Let us keep doing these things and extend the possibilities. We must also search for the new because we have not yet touched the possibilities of our Association's purpose.

Let us undertake during the coming year the task of fitting our Association to be of more service to every lawyer throughout these United States. Let us ever be conscious of our public responsibility and the services, which as lawyers, we render professionally and to the relationship which we must assume in community, state and international affairs.

Views of Our Readers

(Continued from page 909)

lender or vendor and seldom examined by a lawyer for the borrower or purchaser. Will the auto salesman who also probably gets a commission on the car financing advise his customer to check other credit companies or banks in order to get the lowest rate of interest and other costs? Will he explain possible hidden charges in the contract? Will he try to determine if the customer is in a financial position to buy a car in the first place? The man's lawyer would. The same situation often prevails in the sale of other goods, chattels and realty. It is improbable that business generally will urge its customers to seek the guidance of lawyers.

Accordingly, the legal profession does not have that friend in the court of public opinion that the medical profession enjoys. It can, but first lawyers must get legal services back into the hands of lawyers. The public must be convinced that as the doctor only can heal the body so can the attorney only bring peace to the mind and security to the pocketbook.

May I add, whoever heard of a doctor taking a case on a contingent fee?

LOUIS ALEXANDER TRAXEL
Washington, D. C.

The Founding Fathers on Executive Secrecy

Senator Hennings (The People's Right To Know, July, 1959) seems to weaken his otherwise strong case against the privilege of executive secrecy contra their right of the sovereign people to information as to what the government officials are doing when he apparently justifies the claim of the Executive to withhold from Congress (*both* Houses) information in the field of foreign affairs, especially concerning treaty making.

The quotation from President George Washington set forth in *U. S.* v. *Curtiss-Wright Export Corp.* does not justify the privilege. Washington said:

> The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice *and consent of the Senate*, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the *House of Representatives* to demand and to have as a matter of course all papers respecting a negotiation with a foreign power would be to establish a dangerous precedent [Italics added.]

George Washington obviously did not conceive the Senate to be a mere "rubber stamp" in the treaty-making function and in foreign affairs.

Nor does the Senator's quote from Patrick Henry's statement in the constitutional debates support the claim of executive secrecy against the Senate's right to advise and consent to treaties. Henry stated:

> Such transactions as relate to military operations or affairs of great consequence, the immediate promulgation of which might defeat the interests of the community I would not wish *to be published*, until the end which required their secrecy should have been effected. [Italics added.]

It would seem that more attention should be given to Patrick Henry's statement that "the liberties of a people never were, nor ever will be secured, when the transactions of their rules may be cancelled from them".

JOHN F. X. BROWNE
Far Rockaway, New York

Labor Courts Would Help Economy

That the steel strike was allowed to occur is graphic proof of the urgent needs for new laws to deal with the internecine strife between labor and industry. The nation's welfare depends upon a solution to the dilemma.

Problems such as inflation, increased wage demands, the need for an expanding production base, feather-bedding, and foreign competition are no longer insulated from public concern. The public interests, as represented by the often distorted image of a Government setting forth conflicting policy considerations, requires a relatively stable economy in which our nation may grow and prosper.

It is this conflict of interests among the various groups that compose our economic fabric which must be reconciled. American jurisprudence offers a tentative solution.

Labor courts should be established to adjudicate controversies arising out of industry-labor relations. The courts could apply the doctrine of a "rule of reason", long used in antitrust litigation, to the problems at hand. Evidence would be presented in the traditional common law fashion, by each party to a controversy calling witnesses to testify in their behalf. The Government, as an interested party, would also have the right to present evidence. Under the withering fire of cross-examination, cases might be decided within the framework of our national aspirations.

I. FRANK MILLER
Brooklyn, New York

Mental Disorders:

Their Effects Upon Handwriting

by Hanna F. Sulner

Handwriting analysis, Mrs. Sulner writes, may not only reveal the genuineness of a signature—it may also be used to determine the mental stability of the writer or his mental state at the time of execution of the document in question.

The subject of mental disorders and the relationship between brain functions and handwriting, though always recognized by the medical profession, has not been given the attention which its importance merits in the legal field.

Mental hygiene has received increased attention in recent years. However, brain function and its relationship and effect on handwriting frequently have been regarded with indifference. This fact illustrates the need for giving wider and more accurate attention to this important subject. Not many years ago, it was not known that it could be demonstrated, for example, whether any particular disease was affecting the brain and, consequently the handwriting. The increasing incidence of mental disease has caused a focus of attention on this subject. The role of the "state of mind" and of being "in full possession of faculties" is unquestionably important for the legal authorities and can carry great weight in many cases.

There is an increasing recognition of neurological factors in all kinds of illness and certain mental disorders in the courtroom. In a medico-legal case, for example, when a will is attacked on the basis that the testator was not of sound mind while signing it, the doctor has no chance to examine the testator who is already deceased when the case comes to court. The physician has to depend on previous medical records—if the patient had been hospitalized or had periodic check-ups.

Handwriting is closely related to brain function; consequently mental disorders will be reflected in an individual's handwriting. With the advance of modern medicine, psychiatry and handwriting study, we are able to reconstruct the mental condition of a deceased person. The importance and significance of being "in full possession of faculties" has been demonstrated in many cases involving wills, insurance policies, changes of beneficiary, agreements, assignments and marriage annulments.

The pathology of handwriting is rarely used in court and therefore is not known in everyday practice. When used, however, it has proved vitally important in establishing or disproving authenticity. It is undoubtedly important to recognize those elements that can have a definite bearing on the lawyer's job and are important to the outcome of the case. They can make a great difference between handling a case successfully or losing it. The same document that was previously declared to be authentic by proving that the signature was genuine can be proved not competent by showing that the testator was not in full possession of his faculties when he signed it.

The Brain's Mechanism . . . Localization of Functions

With the progress of medicine, pathologists are able to examine the human brain and present a precise map of the localization of its functions. The cerebral cortex contains layers of nerve cells. The sensory area controls the various sensory modalities. These are somato-sensory, visuo-sensory or audito-sensory cells. The motor area controls any movement of the body musculature, known as voluntary movement, such as the movement of legs when walking, hand movement, including writing, the movement of the lips in speaking, etc.

If any effect arises in the cerebral cortex, in the brain cells or association pathways, or if there is any interruption in their physiological functions by alcohol (intoxication), poison (toxin) or temporary injury, there will be an interruption in their proper function, as disturbance in walking, in speech, or writing, etc. The handwriting expert usually is called into a medico-legal case when the patient is dead and the

doctor has no chance to examine the testator's mental capacity.

Specific brain malfunctions will produce specific changes in the handwriting or specific deviations from the normal writing of the individual. The type of handwriting abnormality indicates the nature of the disease or helps to confirm a prior diagnosis based on medical symptoms.

This is not as startling as it may seem, for the brain controls our senses and our reflexes (movement of our lips, arms, fingers, etc.).

If the testator met the criteria for legal capacity, the document will be considered valid. There are mental disorders that may not be pathological in origin which may arise from other factors. For example, circumstances may cause temporary mental disorder that cannot be traced to a chronic disorder of the mind. There is a substantial difference between insanity and incompetence.

The expert is able to form an opinion based upon an examination of the writing and comparison with the writer's (or deceased's) former writing; he can decide whether a confession, for example, or a signature on a will or any other document was written as a result of free will or was written from dictation while the writer's mind was not able to register what he wrote. Or whether the writing indicates that the writer was, for one reason or another, not in full possession of his faculties and therefore not responsible for his writing.

Weakness, depression, confusion, threats, alcohol, drugs, senility, physical illness (aside from mental disease) each affects a person's general behavior, including his will. The handwriting of a person affected by any one of these maladies will differ in significant detail from his previous writing. It is possible, therefore, to determine in most instances, under what physical, emotional or mental condition a particular writing was done. It can be established whether the writing was done

1. While the writer was in full possession of his faculties and under no strain, stress or compulsion;

2. While the writer was in a highly nervous or depressed condition or under stress or severe strain;

3. While the writer was under the influence of another and wrote what was dictated to him. There is an indication that a confession, a signature or text was written freely, or from dictation, and that a person's mind did not register what he wrote; it was done as an automatic reflex, but without control by his critical faculties;

4. While the writer was intoxicated;

5. While the writer was toxicated or drugged;

6. While the writer was in bed in a physically weak condition;

7. While the writer was mentally unbalanced;

8. While the writer was under the influence of hypnosis or other psychiatric techniques.

Some of the abnormalities which appear in the handwriting of a person and which indicate mental disease or mental or emotional disturbance are as follows:

a. Repetition of letters in word or signature;

b. Repetition of words or several words in a text;

c. Omission of letters or words or parts of letters or words in a text;

d. Transposition of letters;

e. Incorrect spelling, or correct spelling but confusion in the text;

f. Presence of undecipherable words or letters or just plain scribbling (in an otherwise readable text);

g. Indications of lack of control of the writing instrument at times in an otherwise controlled writing;

h. Many unnecessary and meaningless curves, strokes and loops;

i. Interruptions between letters, and mainly when the letters themselves are broken;

j. Trembling, wavering lines and jerkiness.

It must not be assumed that a writing which contains one or more of these faults is necessarily the writing of a person suffering from mental or emotional disturbances. While in many cases it will be so, in other cases these faults may result from severe fatigue or from sleepiness and drowsiness which may come from sleeping pills, for instance. Just as physical symptoms are common to many diseases, so the same handwriting peculiarities may be caused by many factors. The trained handwriting expert, like the trained physician, must evaluate the symptoms he finds in handwriting and relate them to a specific cause.

There is a substantial difference between insanity and incompetence, as mentioned before. There are certain mental disorders which may not be pathological in origin, but arise from other factors. For example, a testator who suffered from cancer signed a change of beneficiary about a week before he died. This contested signature turned out to be genuine, but it revealed signs of mental disorders caused by drugs. This is common in cases of incurable cancer, when drugs are administered in order to relieve the patient from pain. When the testator signed the will in this condition his mind was not able to register what he was doing.

Conscience-Inhibiting Drugs... Used in Totalitarian Countries

Certain drugs paralyze the sense of criticism, fogging the memory and inhibiting all sense of conscience. Some of these drugs (for example, scopolamin) were used by the Gestapo and are in current use behind the Iron Curtain to obtain confessions.

A person under the influence of these drugs acts in a manner totally foreign to his normal character and personality. This technique was used on Cardinal Mindszenty, and, as reported, he reacted according to the classical pattern at his trial. After the trial he was treated in a mental hospital. The results of this "conversion" are not necessarily permanent, although frequently, they are; but the results are just as effective for the purpose desired. A person treated in this manner will betray his condition by unmistakable signs in his handwriting: the signs are very slow writing, interruptions between letters, sometimes letters which are broken, incorrect spelling of one's own name or of simple words, or correct spelling but confusion in the text.

In the court of special sessions, New York County, a defendant denied the validity of an affidavit. He testified

during the trial that the affidavit was signed by him when he was in a "highly nervous state" and "under stress". He said that two men came into his store when he was alone, "scared him to death", forced him into a car and took him to a notary where he was forced to sign an affidavit.

Signatures written under stress bear indisputable signs which make it possible to establish that fact. In such a condition, we find trembling lines and uncertain strokes. A signature or even a word written under stress never shows fluent writing. There are interruptions, not only between single letters, but also in the body of a letter. Sometimes repetitions or omissions, or corrections or overwritings are made.

In this case the signature "written under stress" showed a signature without any inhibition and fluently written. Comparison of specimen writing and the signature on the affidavit established that his claim that he had signed the affidavit under stress was not true. The court declared the affidavit valid.

The famous will of a well-known European aristocrat, Countess Ilona Batthianyi, was challenged by the heirs on the ground that the Countess was not in full possession of her faculties at the time she signed the will, which involved about a half a million dollars.

The will was properly executed, having three witnesses to it, but the signature bore the unmistakable signs of writing done by a mentally disturbed person. The first letter in the signature was repeated five times. There were also other repetitions of letters. A certain part of the signature was omitted, and the tail end of it was decorated with fantastic ornaments. All of these things indicated mental disorder and complete lack of control. The will was declared not valid.

In the case of Mrs. F., according to the husband and the two subscribing witnesses the testator had signed the will while confined to bed but clear in her mind.

The seemingly genuine signature happened to be a "fairly good forgery". Her physical deterioration was obvious in her handwriting specimens, which were written weeks before she supposedly had signed the alleged will. A comparison chart showed that at the date of the will the testator was physically and mentally unable to produce handwriting such as appeared on the will.

Based on this report, further investigation was made. It turned out that her husband had practiced her signature and used as a model her automobile license, but this was signed by her when she was in a healthy condition. The forger escaped with a settlement.

Proving a Will Genuine . . . No Change of Condition

Another contested will was declared valid by proving that it was not only genuine but also that it was written by a person of sound mind. The signature in question when compared with several other signatures and handwriting written on the same day, and also with writings made before and after the ostensible date, showed the same physical and mental condition throughout, without the slightest change.

All of the signatures were written in the usual clumsy manner, but without any hesitation. They exhibited certain characteristic habits, such as an unusual loop in the "t", special curves in the "C", as well as other peculiarities of the writer, all of which appeared identically in each signature. The case was settled in the Surrogate Court in Mineola.

In a recent case, an attorney who handles many estates in the course of his practice was shocked to learn that one of his clients, whose will he had prepared with great care some years before, had died leaving another will.

The new will made considerable changes in favor of a different group of relatives who had been with the deceased during his last days. Relatives who had been beneficiaries in the first will naturally questioned the new one.

Painstaking examination of the signature on the will, when compared with a large number of authentic signatures, showed conclusively that the signature on the will was not written freely, but from dictation, while the deceased's mind was not able to register what he wrote. He was present physically but not in his mind. He could automatically write his name as a reflex movement, having heard and having seen his name so many times. Examination showed that the signature was interrupted many times following the forced dictation. There were corrections indicating the misspelling of similar "sounds", and many other factors as demonstrated on photographic enlargements.

In a mysterious disappearance of money from a savings account, the signatures appearing on the withdrawal slips, when compared with the authentic samples, turned out to be genuine, but as was noticed by the expert witness, written "under unusual circumstances".

Mrs. Willoughby denied that the signatures were hers, claiming that she never went to the bank and never took out any money. It was noticed that on one of the slips, Mrs. Willoughby, who always signed her name, Mary Ellen

Hanna F. Sulner received her training as a questioned document examiner in Hungary. She studied criminology in Budapest and Germany and holds a degree in law and philosophy. She and her husband left Hungary because they refused to testify falsely in the Cardinal Mindszenty case. Mrs. Sulner has been in New York since 1950 and has been retained on handwriting and document problems by the United Nations Secretariat, the Governments of the United States, Mexico, Brazil, and Venezuela as well as the Law Department of the City of New York and many lawyers.

Willoughby, left out the "u". In a case of forgery, the forger would be too scrupulous to do this and it would be spelled correctly.

The attorney raised the question of temporary amnesia, which the expert could not confirm, neither could it be proved that she was intoxicated or in a drugged condition. The expert was not able to give a definite opinion, except the statement that it was written "under unusual circumstances".

Further investigation discovered that she was treated for severe headaches by a girl friend's doctor friend. The alleged doctor, while treating her with *hypnosis*, asked her to bring her bank book and on three different occasions she was asked to write her name on the withdrawal slips of her bank; her girl friend then cashed the slips.

In some instances the expert can not arrive at a definite conclusion, but some suggestion may lead to the discovery of a fraud.

However, given a basic explanation of the brain's function and its effect on handwriting, this article intends to acquaint the lawyer with those facts that will enable him to recognize whether a person was or was not in full possession of his faculties at the time he prepared a particular document.

It intends also to call the attention of the attorney to the various possibilities that exist for determining the mental state of a person who executes a written instrument.

This method can be valuable in the preparation of a trial involving questioned documents, especially in the handling of the large number of cases involving contested and questioned wills.

Abraham Lincoln's Language

by **Harold J. Baily** • ***of the New York Bar (New York City)***

The English language is the American lawyers' tool. It enables a man to think, to express his thoughts in words either by speaking or writing them and thus to appeal to the reason and emotions of others. Master the English language and you will advance in your profession. What client, what opponent, what jury, what trial or appellate judge is not impressed, moved and persuaded by sound thoughts, accurately expressed in clear, simple and precise English?

It may be that Lincoln could have risen to the presidency had he not mastered the English language. Certain it is that lacking his mastery of English he would not have scaled the heights which he has reached in the opinion of mankind. Who would now study, memorize or even recall his inaugural addresses or the Gettysburg address did they lack the simplicity, the clearness, the aptness, the force of his diction? All his important speeches are impressive in their appeal, not only because of the majesty of his words, but from the intensity of his feelings and the sincerity of his convictions.

We have had generals in the White House who have not been great presidents. Lincoln was a great president who had the abilities of a great general. One of these abilities was the capacity to think. Another was his proficiency in expressing his thoughts. A single illustration must suffice. On February 3, 1862, Lincoln wrote to General George B. McClellan. McClellan's plan was for a movement of the Army of the Potomac down the Chesapeake, up the Rappahannock, across land to the railroad terminus on the York River, but Lincoln's plan was to move to a point on the railroad southwest of Manassas. Then in crisp, concise English he demands of McClellan a bill of particulars:

> If you will give me satisfactory answers to the following questions, I shall gladly yield my plan to yours.
>
> 1st. Does not your plan involve a greatly larger expenditure of *time*, and *money* than mine?
>
> 2nd. Wherein is a victory *more certain* by your plan than mine?
>
> 3rd. Wherein is a victory *more valuable* by your plan than mine?
>
> 4th. In fact, would it not be *less* valuable, in this, that it would break no great line of the enemy's communications, while mine would?
>
> 5th. In case of disaster, would not a safe retreat be more difficult by your plan than by mine?
>
> Yours truly
>
> ABRAHAM LINCOLN

Lincoln spoke and wrote "with the steady heat of an intense and strenuous soul". Lincoln's mastery of English helped him to rise to great heights. What a mighty force it is to be able to use our glorious language to perfection! The language of the Bible, Milton, Shakespeare, Jefferson, Wilson, Churchill, Frost, MacLeish and the rest. The English language. Abraham Lincoln's language. Make it your own.

Mr. Smith (GS-14) Goes to Washington: Our Federal Budget and How It Grows

by John D. Garwood • *Professor of Economics at Fort Hays State College (Kansas)*

In this article, Professor Garwood offers an amusing example of why our Federal Government has increased its spending approximately seventy times during the past forty years and why the Government's expenses would have increased even without two wars, a depression and the consequent inflation. It is all the fault, he charges, of one obscure Government employee in Salt Lake City who has tremendous influence in Washington.

One of the most intriguing questions of recent years has been answered by the Department of the Interior which announced that, according to their survey, over 25,000,000 persons over 12 years of age either hunt or fish, or both.

The Department engaged 300 people in making this survey to determine the country's hunting and fishing habits in 1955. The results were dramatically portrayed in a fifty-page, slick paper, freely illustrated pamphlet.

Speaking further to the point, the Department revealed that more people in small towns or rural areas hunt and fish than do those who live in the larger cities. Further, the survey pointed out that more young people than older people hunt and fish.

Specifically, $2,850,979,000 was spent for hunting and fishing, over 10.4 billion miles were traveled by automobile by these sports enthusiasts, and over a half billion days were consumed in 1955 in these activities. Two out of three fishermen purchased licenses, while for hunters it was five out of six.

The tab for this survey amounted to $200,000 plus cost of printing.

There is considerable statistical doubt as to whether a sample obtained by questioning individuals in this manner can be projected accurately upon the whole population. A question of yet higher priority may well be asked: is a government agency justified in using the taxpayers' money for such purposes?

At mid-century we are plagued by problems of financing a 74 billion dollar budget. Taxes siphon from a fourth to a third of the country's income for governmental use. It is conceivable that the public weal would not be jeopardized by an omission of such a hunting and fishing survey in the future.

One of the most engagingly subtle books of the year has been written by C. Northcote Parkinson, Raffles Professor of History at the University of Malaya. His book is entitled *Parkinson's Law.*

Tongue in cheek, Professor Parkinson has worked out a law which he entitled "Parkinson's Law" or the "Rising Pyramid". The law and an illustration of how the law operates is as follows:

> Work expands so as to fill the time available for its completion...
>
> Picture a civil servant called A who finds himself overworked. Whether this work is real or imaginary is immaterial ... For this real or imagined overwork there are, broadly speaking, three possible remedies. He may resign; he may ask to halve the work with a colleague called B; he may demand the assistance of two subordinates to be called C and D. There is probably no instance in history of A choosing any but the third alternative. By resignation he would lose his pension rights. By having B appointed, on his own level in the hierarchy, he would merely bring in a rival for promotion to W's vacancy when W (at long last) retires. So A would rather have C and D, junior men below him. They will add to his consequence and, by dividing the work into two categories, as between C and D, he will have the merit of being the only man who comprehends them both. It is essential to realize at this point that C and D are, as it were, inseparable. To appoint C alone would have been impossible. Why? Because C, if by himself, would divide the work with A and so assume almost the equal status that has been refused in the first instance to B; a status the more emphasized if C is A's only possible successor. Subordinates must thus number two or more, each being thus kept in order by fear of the other's promotion. When C complains in turn of being overworked (as he certainly will) A will, with the concurrence of C, advise the appointment of two assistants to help C. But he can then avert internal friction only by advising the appointment of two more assistants to help D, whose position is much the same. With this recruitment of E, F, G, and H the promotion of A is now practically certain.
>
> Seven officials are now doing what

Guercio

John D. Garwood is Professor of Economics at Fort Hays Kansas State College. He received his master's degree from the University of Wisconsin and his Ph.D. from the University of Colorado. His area of specialization includes taxation and money and banking.

one did before. This is where Factor 2 comes into operation. For these seven make so much work for each other that all are fully occupied and A is actually working harder than ever. An incoming document may well come before each of them in turn. Official E decides that it falls within the province of F, who places a draft reply before C, who amends it drastically before consulting D, who asks G to deal with it. But G goes on leave at this point, handing the file over to H, who drafts a minute that is signed by D and returned to C, who revises his draft accordingly and lays the new version before A.

What does A do? He would have every excuse for signing the thing unread, for he has many other matters on his mind. Knowing now that he is to succeed W next year, he has to decide whether C or D should succeed to his own office. He had to agree to G's going on leave even if not yet strictly entitled to it. He is worried whether H should not have gone instead, for reasons of health. He has looked pale recently—partly but not solely because of his domestic troubles. Then there is the business of F's special increment of salary for the period of the conference and E's application for transfer to the Ministry of Pensions. A has heard that D is in love with a married typist and that G and F are no longer on speaking terms —no one seems to know why. So A might be tempted to sign C's draft and have done with it. But A is a conscientious man. Beset as he is with problems created by his colleagues for themselves and for him—created by the mere fact of these officials' existence—he is not the man to shirk his duty. He reads through the draft with care, deletes the fussy paragraphs added by C and H, and restores the thing back to the form preferred in the first instance by the able (if quarrelsome) F. He corrects the English—none of these young men can write grammatically—and finally produces the same reply he would have written if officials C to H had never been born. Far more people have taken far longer to produce the same result. No one has been idle. All have done their best. And it is late in the evening before A finally quits his office and begins the return journey to Ealing. The last of the office lights are being turned off in the gathering dusk that marks the end of another day's administrative toil. Among the last to leave, A reflects with bowed shoulders and a wry smile that late hours, like gray hairs, are among the penalties of success.[1]

We in the United States have seen our National Government's spending increase approximately seventy times in the last forty years, almost double in the last decade. A portion of this increase has been brought about by a higher price level. Our defense expenditures amount to 62 per cent of the total budget.

Yet even without these two factors the budget figures would grow decade by decade because no one, not even the budget director, can prevent it.

A tell-tale thread that runs through all the mahogany-lined offices of the Government is that those on the Government payrolls do not wish to minimize expenditures, indeed, every motivating force of human conduct, *i.e.*, prestige, salary, status, non-monetary emoluments, etc., leads those on the public payroll to seek yet more.

This may best be explained through the use of a simplified model—a common technique of economic analysis. Budget making for the Federal Government is a year round process. During the spring and early summer the preliminary estimates are being made. Let us examine in simplified form the steps in this procedure.

Suppose "X" department of the Federal Government in Washington alerts its office in Denver that its budgetary estimates are due July 15. The Denver office in turn, let us suppose, has five branches or offices in the Rocky Mountain area. Let us look in on the Salt Lake City office.

Joe Smith, who is in charge of this particular office, must estimate his needs for the next fiscal year. Smith's departmental budget this fiscal year amounts to $295,000. Thirty-seven people work under him.

Is it logical to assume that Smith will cut his department's estimates? It is not unlikely that his department has grown in size and activities during the past years. He may have seen it grow from five employees to thirty-seven. Slowly, through attrition processes of death and transfer, Smith has moved to the top. Administrators are known in government circles in terms of budgetary figures, not by given names.

Smith's life has been spent enlarging his place in the government hierarchy—his office size, his large, heavy desk, his expense account, his sphere of influence in Salt Lake City. He has a private secretary who, in turn, has her own office. All of these go along with an expenditure of close to a third of a million dollars.

Progress, to Smith, is to enlarge his departmental program by increasing his staff, which in turn will perform additional functions. Thus, the new budget estimates represent a challenge to Smith—how to enlarge them and secure additional appropriations. His working hours are spent turning this thorny matter over in his mind. A less aggressive administrator would simply pad his figures, send them along, and be content after the expected cut to have allocated to him the figures of the current budget.

Not so Smith. The fire and drive of a "man on his way" burns in his veins. The budgetary process brings out the best that is in him. He submits figures of $600,000 to the Denver office and defends them with the courage of a Leander. (It turns out well, his heroism is rewarded with an appropriation of almost his requested amount.)

The head of the Denver office is motivated on an even grander scale by

1. Parkinson, Northcote C., PARKINSON'S LAW (Houghton Mifflin Co., Boston, 1957) 207.

the same kingdom-making forces that moved Smith. He accomplishes his budgetary mission through the medium of thousands of man hours, all financed by government collections.

When the figures from its offices across the country reach "X" department in Washington, the process is repeated, this time on a scale which dwarfs those previously recounted.

When the figures of "X" department are submitted to the Director of the Budget, they represent so many fields of human endeavor, they cover so many activities that he cannot possibly appraise correctly all the allegations of need set before him . . . and then there are the many other government departments comparably situated.

The point being labored is that those who are in a position to curtail governmental spending—Smith in Salt Lake City—stand to lose should this spending be curtailed. He acts accordingly.

His request for an additional $300,000 is chicken feed when cast against the total budget of $74 billion. He is aware that across the country other government administrators must face up to the same problem. Those who go up the ladder are not those who cut their staff and halve their departments.

The thousands of Smiths throughout the Government have a vested interest, a human interest, in large budgets.

Thousands of budgeteers spend their working lives and millions of man hours paring over their multiple digit figures, which in 1958 crystallized into nearly 1300 pages of government spending.

The Pentagon annually submits a budget put together after millions of man hours. The congressmen who check the estimates are confronted with stacks of carefully made charts, tables, figures, all painstakingly assembled by the brass and near brass, who are trained to meet any emergency, budgetary or otherwise.

In such hearings, the Pentagon has a decided advantage over the postal department. A new post office in San Francisco is not capable of launching missiles at Vladivostok, whereas a new submarine, which could conceivably cross the Pacific, might accomplish such a mission and, hence, be a definite threat to the Soviet. A post office is not in this "national interest" category.

Thus, the Director of the Budget, the President, and Congress as the final arbiter of the budget are at the mercy of Joe Smith (GS-14), Salt Lake City, Utah. Smith's decisions are more far reaching than those of John F. Gordon, president of General Motors, world's largest corporation.

Because of the thousands of Smiths' decisions to enlarge their departments' activities, every taxpayer in the United States must fork over. This is something even Mr. Gordon cannot do.

Thus in the United States today Joe Smith (GS-14) rules supreme. Although Smith and his neighbors do not recognize him as such, he is the "top banana" in the country's economic life.

Activities of Sections

SECTION OF PUBLIC UTILITY LAW

The Council of the Section of Public Utility Law, at its regular Spring meeting in Palm Beach, Florida, on March 20 and 21 completed the organization of its program for the Section to be presented at Miami Beach. As announced by Chairman John B. Prizer, of Philadelphia, in a letter sent out in mid-July to the entire membership of the Section, this program featured a balanced presentation of the regulatory problems facing various utility industries.

The impact of inflation, legislative investigation of the regulatory process, recent developments in the use of atomic energy, the production of electric power, and current problems in natural gas pricing were among the topics to be covered. These features were scheduled in addition to the annual report of the Standing Committee To Survey and Report as to Development During the Year in the Field of Public Utility Law. That committee was headed during the 1958-59 Section year by John Robert Jones, of the Columbus, Ohio, Bar.

Another interesting sidelight on the program organized for the Miami Beach meeting was the variety of speakers invited. In the past years, the Section's program has not been confined to addresses by members of the Bar. And the Miami Beach sessions featured papers from a state regulatory commissioner, a New York financial analyst, a financial journalist, a representative of Congress, an airline executive, and a member of the Atomic Energy Commission, in addition to addresses from distinguished members of the Bar. It was the sense of the Council in organizing this program that the views of these other professional specialists assist in giving Section members a better over-all evaluation of present-day regulatory problems of the public utility industries.

The outstanding social feature of the Miami Beach program, of course, was to be the Annual Cocktail Party and Dinner Dance, scheduled to be held at the Americana Hotel on August 25. This popular annual social function of the Section of Public Utility Law has become a well-known, successful tradition.

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

The ultimate test of the value of the Section and its work is its ability to hold the interest of its membership. By such standard the Section has fared well. It has enjoyed a tremendous growth, with a membership roll now in excess of 10,300. At this time last year the 9,000 member mark had been achieved. The increase this year is the largest ever experienced by the Section and it is only fair to say that it is due in large measure to the groundwork

(Continued on page 970)

Witchcraft Trials in England:

An Examination of Judicial Integrity

by George N. Conklin • *Associate Professor of Classics and Comparative Literature at Wesleyan University (Middletown, Connecticut)*

To say that the offense of witchcraft was wholly imaginary since witchcraft is scientifically impossible, Professor Conklin writes, is like saying that there were no alchemists because alchemy is impossible. In this brief article, he explains the attitude of sixteenth and seventeenth century lawyers and judges toward a crime that has been erased from the statute books by the scientific era in which we live.

The unexamined generalizations which describe the grim days of the witch terror in England[1] make it somewhat difficult to reconcile a consequent age of credulity and injustice with the same period which the late Alfred North Whitehead singled out as the century of genius.[2] It is even more difficult to equate superstitious tyranny of the courts and men of law (for they, tarred by the same brush, are frequently held with the ignorant and the gullible clergy[3] as sharing the responsibility for the persecution of the innocent) with the times of jurists of the calibre of Selden and Sir Matthew Hale.[4]

Now since fatuous explanations have been offered to account for the roll call of distinguished theologians[5] who believed in the possibility of witchcraft,[6] and these without any regard for the solemn tenents of Christian orthodoxy or Biblical scholarship of the age,[7] it is scarcely surprising that what is assumed of the conduct of the courts does not in the light of the actual facts establish either their irresponsibility or credulity. So far as the guilt of the legal profession is concerned four commonplaces of misinformation provide the main support of the contention. By a brief examination of these notions it is proposed here—though not to deny that tragic executions and deplorable miscarriages of justice did occur—to indicate at least some explanation by way of defense for the oft-maligned courts and to offer some reassurance as to the integrity of the men who conducted the notorious witch trials.

The first (and for modern consumption usually the weightiest) contention is simply that *the offense being wholly imaginary, no such crime as witchcraft could exist or was ever practiced.* The corollary here of course is that all of the accused were innocent and all evidence by definition false.

In effect this is like saying that because alchemy is impossible there were no alchemists. The crime of witchcraft was to the seventeenth century jurist neither imaginary nor a popular superstition. Evidence as to its actual practice was an entirely different problem and the prime matter for determination under the statutes of the realm.[8]

1. The height of the terror occurred in the last five years of the reign of Elizabeth I and the first five of James I. More trials took place in the reign of Elizabeth than the entire seventeenth century. Pollock and Maitland (HISTORY OF ENGLISH LAW, II, 555-6) err in stating that few were executed in the Elizabeth period and that the days of the Commonwealth were the worst. So too J. F. Stephen (2 HISTORY OF CRIMINAL LAW 432). *Cf.* Ewen's WITCH HUNTING AND WITCH TRIALS (New York, 1924) pages xi, 110.

2. SCIENCE AND THE MODERN WORLD (New York, 1925) Chap. 3. He describes the period in fact as "... the one century which consistently, and throughout the whole range of human activities, provided intellectual genius adequate for the greatness of its occasion" (page 58).

3. Including presumably Cudworth, Casaubon and Barrow and others of note who upheld the theological necessity for the belief in the demonic as against the alternative of materialism. *Cf.* Notestein, A HISTORY OF WITCHCRAFT IN ENGLAND, Washington, D. C., 1911, 290 *ff.*

4. To say nothing of the Continent's Suarez, Bodin and Grotius. Ewen in his WITCH HUNTING AND WITCH TRIALS, New York, 1929, pages 50-51, notes among the judges who condemned witches such eminent figures as Sir James Altham, William Daniel, Sir Thomas Gawdy, Henry Hobart, John Southcote and William Steele.

5. As well as skeptics like Sir Thomas Browne and Joseph Glanvill, philosophers like Bacon and More, or a scientist like Robert Boyle. The usual judgment is that these men were normal and sane in all other matters.

6. The *possibility* of witchcraft and the demonic (as against its contemporary prevalence) was a basic tenet of orthodox theology. From a legal point of view of course the belief in its possibility and consequent practice has no bearing on the scientific possibility of its achievement.

7. Despite attacks by lesser critics of Scripture such as Scot and Webster, the authoritative Biblical scholarship of the age vindicated the demonological content of the Bible. That Exodus 22:18, *Thou shalt not suffer a witch to live*, was the correct translation (as against the suggested alternative of poisoner) was maintained by the greatest exegetes of the period and indeed is so recognized today. Further in the period before the new criticism, the crux in terms of Biblical authority and theological corollary was simply that either Christ cast out demons or he did not. Whatever the modern division among Protestant thinkers on the matter of the reality of the demonic, the present position of the Roman Catholic Church needs no comment.

8. J. B. Thayer (LEGAL ESSAYS, Boston, 1908, page 326) comments on seventeenth century English witch trials, "When they tried people for witchcraft, it was a question, not indeed whether there were a devil and evil spirits able to communicate with men and to operate among them, for the truth of this was assumed, but whether on a given occasion, these creatures had actually been operating in league

Irrespective however of either theological tenets or lay opinion as to the supernatural achievement, that witch cults existed and witchcraft was practiced has been well established by modern research in history and anthropology.[9] Whatever the absurdities of witchcraft in terms of possible efficacy, there is no doubt that those believers who engaged in it in fact carried out practices which quite apart from conjurations and spells were in themselves felonies.[10] Quite aside from the dubiety of presuming all confessions to have been false[11] it is noteworthy that some of the impossible testimonies have been simply explained by modern clinical investigation.[12] Finally it should be observed that in present-day regions where the belief in magic and witchcraft still persists, the legal realities of adjudicating actual cases parallel markedly the identical problems of the seventeenth century.[13]

The second argument is that *the witchcraft laws irrational in themselves were of unnecessarily extreme severity.*

Historians of English law have long noted the relative mildness of the witch epidemic in England compared to Continental Europe. Accordingly the statutes of Henry VIII and Elizabeth I have been described as having been specifically occasioned by attempts to use divination for purposes regarded as treasonable.[14] While the statute of James I was more severe than the Elizabethan,[15] reflecting perhaps James' conscientiousness as Defender of the Faith,[16] it is remarkable that the principle of intent (homicide or injury) is inherent in both statutes so far as capital punishment is concerned and that both apply (a matter frequently overlooked) lesser penalties for lesser offenses.[17] So far as impersonal legal reflection on the question of intent is concerned, the erudite Selden's trenchant comment is revealing:

> The law against witches does not prove that there be any; but it punishes the malice of those people that use such means to take away men's lives. If one should profess that by turning his hat thrice, and crying buz, he could take away a man's life (though in truth he could do nothing), yet this were a just law by the state, that whosoever should turn his hat thrice, and cry buz, with an intention to take away a man's life, shall be put to death.[18]

As to the severity of the witchcraft statutes, in an age when English law was most harsh[19] they are in comparison with other capital crimes of the age[20] actually mild in view of the gravity of the offense.[21]

Thirdly, as an obvious sequel to the assumption made of the laws, it is maintained (frequently with journalistic indignation) *that almost no one escaped the tyranny of the courts and many thousands were executed.*

While the persistent exaggeration of the numbers executed for witchcraft in England is no longer accepted by modern scholars, thanks chiefly to the work of Kittredge and the definitive

George N. Conklin (A.B. Cornell University 1936) received his Ph.D. in English and Comparative Literature at Columbia University. He has served on the faculties of Columbia and Wayne State Universities in English Literature and is currently associated with the Classics Department of Wesleyan University. A Lieutenant Commander on the retired list of the U.S.N.R., he has also served as a Research Consultant for the U.S.A.F.

with the accused persons and in a certain way."

Posing the question if our law had taken the same course how we should have dealt with it, Thayer answers, "Precisely as they formerly dealt with it, precisely as we now deal with any other question of fact,—by calling witnesses, by expert testimony and by a jury—or, it may be a judge; *and this was the same machinery that our ancestors used in the witchcraft cases.*" [My italics.]

9. *Cf.* Murray, THE WITCH-CULT IN WESTERN EUROPE (Oxford, 1921); Summers, THE HISTORY OF WITCHCRAFT AND DEMONOLOGY (London, 1926); Michelet, LA SORCIÈRE (Paris, 1862); E. B. Tylor, PRIMITIVE CULTURE (London, 1903); Hansen, QUELLEN UND UNTERSUCHUNGEN ZUR GESCHICHTE DES HEXENWAHNS (Bonn, 1901).

10. For example, treason, sodomy, poisoning, coining, scduming the dead and other crimes. *Cf.* Ewen (*op. cit.*, page 21); Summers (*op. cit.*, c. I).

11. Particularly with the absence of the use of torture (*cf. infra*). Such a judgment in fact negates *all* human testimony and is at least from an historian's point of view a dubious working principle.

12. The clinical instance of polymantia for instance supports the existence of the extra teat frequently found on the accused. The effects of various alkaloids (particularly *atropa belladonna*) present in unguents used by witches accounts for many details of confessions based upon drug-induced sensations and hallucinations. *Cf.* Murray (*op. cit.*, pages 90-91, 279-280); Hughes, WITCHCRAFT (London, 1952) pages 116-125; and Conklin, *Alkaloids and the Witches' Sabbath*, 130 AMERICAN JOURNAL OF PHARMACY (No. 5).

13. Harley (AN AFRICAN SURVEY (Rev. 1956) (London, 1957) page 623) mentions the variety of laws prohibiting magic and witchcraft in countries south of the Sahara and comments: "The reason for bringing any of these practitioners [witch, sorcerer, and witch-finder] within the scope of the criminal law is that the practice of witchcraft and witch-finding do actually cause death or injury."

Elias, THE NATURE OF AFRICAN CUSTOMARY LAW (Manchester, 1956) page 226 remarks of African witch practices "... this serious offense commonly designated witchcraft is really a matter of cunning and clandestine poisoning through a variety of physical contacts".

See also C. Dundas in 45 JOURNAL ROYAL ANTHROP. INST. 278.

14. Pollock and Maitland (*op. cit.*, page 665).

15. Both statutes (5 Eliz. I c. 16; 1 Jas. I c. 12) punished invocations and conjurations of evil spirits for any purpose by death. This offense was considered to be more heinous than the lesser crime of practicing witchcraft. The James statute however set the death penalty for exercising witchcraft to waste, consume or lame persons in body or members or to waste, destroy, or impair goods where the Elizabethan statute prescribed imprisonment for one year for the first offense and death for the second.

16. The *Demonologie* of James I was specifically written as a defense against atheism and to prevent the people from falling, as King James put it, into the old error of the Saducees in denying the existence of spirits. Its influence on witch persecutions has been grossly overestimated and James unfairly dubbed "Bloody Demonologist" and "Royal Inquisitor" through ignorance of its purpose. Actually during his reign James expressed his conviction in a case in Leicestershire (July 16, 1616) after an examination of the chief witness that there was no instance of witchcraft and that a serious miscarriage of justice had occurred (the defendants having been executed). *Cf.* State Papers 1611-8, page 388. In a case of simulated possession (Staffordshire Assizes, July 26, 1621) the confession of the culprit and the frequency of such "forged Possessions" according to Fuller (CHURCH HISTORY OF BRITAIN (1655) Bk. X, Cent. XVII, 54) caused James to regard the workings of witchcraft as falsehood and delusion and adds significantly, "King James . . . was no less dexterous than desirous to make discovery of these deceits."

17. Both under Elizabeth and James, exercising witchcraft "to kill or destroy persons" was punishable by death. Lesser offenses punished by one year's imprisonment were exercising witchcraft "to the intent to get, find, or tell of money, or goods lost or stolen" and "to the intent to provoke any person to unlawful love or for any other unlawful intent or purpose".

18. THE TABLE TALK OF JOHN SELDEN (ed. S. H. Reynolds, Oxford, 1892) page 195.

19. L. Radzinowicz in his HISTORY OF ENGLISH CRIMINAL LAW (New York, 1948) 139, cites J. Hall (THEFT AND SOCIETY): "If one were to mark out the period of greatest severity in modern English law the sixteenth and seventeenth centuries would undoubtedly form the central area."

20. L. Radzinowicz (*op. cit.*, page 140) lists among crimes punishable with death in the sixteenth and seventeenth centuries "Arson, burglary, house-breaking and putting in fear, horse-stealing, abduction with intent to marry and stealing from the person above the value of a shilling."

21. Similar to the opinion on English witch laws is the equally common misconception of the supposed witch terror under the Spanish Inquisition. Actually the Inquisitors though admitting its possibility ignored the supposition of its actual practice. The Spanish people alone escaped the witch persecution of the rest of Europe. *Cf.* R. Trevor Davies' FOUR CENTURIES OF WITCH-BELIEFS (London, 1947) page 62, and Pelayo, 2 HISTORIA DE LOS HETERODOXOS ESPAÑOLES (Madrid, 1880) 669.

studies of Ewen, the extraordinary facts concerning the ratio of death sentences to arraignments are generally unknown. Actually in the Home Circuit the chance of a witch's being executed when arraigned before the regular justices was not great, since eighty-one persons out of every one hundred escaped the death penalty.[22] This is particularly amazing in consideration of the widespread popular belief in the power of witches, the divine mandate of Exodus and the power of the jurors.[23]

Further it is possible by correlating the estimates of the total number of executions for all crimes (cited in L. Radzinowicz's *History of English Criminal Law*[24]) with Ewen's estimate of the number executed for witchcraft to assess the proportion of executed witches to all executions as well under 5 per cent.[25]

Finally, and this is normally advanced as the clinching argument against the courts, it is alleged that *all confessions were a direct result of torture and consequently invalid.*

While such an assumption might be valid for the Continental persecutions, it is highly questionable applied to England where the use of torture was unknown as a legalized method of obtaining evidence or confessions.[26] The practice of torture was in fact contrary to common law and only lawful as an act of royal prerogative. There is no evidence whatsoever that torture was ever used to extract confessions from female witches.[27] In only one instance, against a male witch, the royal prerogative was used by James in 1620 to torture a man for practicing sorcery upon the King.[28] But here the use of the royal prerogative and the resort to torture seem more because of treason than sorcery.[29]

The problem of the use of *peine forte et dure* permitted up to 1772 when a prisoner "stood mute" upon arraignment can be resolved in terms of the relative infrequence of the practice in this period[30] and the nature of its function in English law as against torture. *Peine forte et dure* was *not used to extract evidence from a prisoner* but to compel him to plead when he stood mute at his trial or if he would not plead, to *punish* him.[31]

The misconceptions just examined are not offered here as a kind of forensic tour de force with the idea of defending witch hangings nor certainly of glossing over the tragic reality of the innocent who suffered under the witch terror. It should be at least considered however that the men of law, men of good Christian conscience and orthodox conviction, were, whatever their errors (by our standards of science and law) in accepting evidence, in their court practice neither irresponsible nor lacking in integrity. Certainly the assumption that they were sadistic fanatics should be regarded with deep caution.

The defense rests.

---

22. Ewen, *op. cit.* page 31.

23. Thayer, *op. cit.* pages 322-323 on questions brought up in proceedings for witchcraft "They were settled by the verdict of a jury—instructed by evidence, to be sure, and advised by the court, but having at that time (unlike the present) the legal right to find a verdict on their own information and knowledge only, although they had not publicly stated this in court so that it might be sifted, and although it was contradicted by all the evidence in the case. While the jury had this great and unmanageable power, their verdict was practically uncontrollable; he whom they acquitted was finally acquitted, and he whom they found guilty was guilty once for all, saving only the judges' power of delaying execution and the king's pardoning power. Points of law might be taken, but there was no way of reviewing or setting aside the verdict in a criminal case for an error in finding fact."

24. Based on the studies of A. Marks on J. C. Jeaffreson's (editor of MIDDLESEX COUNTY RECORDS, 1886-1892) original computations.

25. Calculating from Mark's estimate of total executions in England from 1542 to 1660 of 20,150 and Ewen's estimate of 1,000 executions for witchcraft from 1542-1736.

26. Radzinowicz, *op. cit.* page 26.

27. Ewen, *op. cit.* page 65. So accepted is the belief in the cause-effect relationship between torture and witchcraft that Pollock and Maitland bluntly affirm (*op. cit.*, page 555): "Where there is no torture there is little witchcraft."

28. CALENDAR OF STATE PAPERS (Dom. Ser. 1619-25) page 125.

29. Parry, HISTORY OF TORTURE IN ENGLAND (London, 1933) 54, points out that during the reign of James I torture was resorted to mainly in cases of high treason.

30. J. C. Jeaffreson (2 MIDDLESEX COUNTY RECORDS xvii) for example found that from 1609-1616 only thirty-two persons (three of whom were women) died by *peine forte et dure* for declining either to confess or plead to indictments in Middlesex. He does not state if any of these were indictments for witchcraft.

31. Parry, *op. cit.* 98. *Peine forte et dure* originated in the reign of Edward I (3 Ed. I. c. 12) under the act entitled, "The punishment of Felons refusing Lawful Trial". It was abolished in the reign of George III in 1772 (12 Geo. III, c. 20). Radzinowicz (*op. cit.*, page 659) points out however that under 12 Geo. III, c. 20 those arraigned or indicted for piracy who stood mute or did not answer directly to the charge were to be convicted by the same court as if they had been convicted by verdict or confession.

No attorney is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into . . .—*Montriou* v. *Jefferies*, 2 Car. & P. 113 (1825).

The True Shakespeare:

England's Great and Complete Man

by **Dorothy and Charlton Ogburn**

In this article, Mr. and Mrs. Ogburn sum up for the proposition that the true identity of the author of the Shakespearean plays was the 17th Earl of Oxford, Edward de Vere. The Ogburns' article is the penultimate in the group of articles that we have been publishing on the question of the identity of Shakeaspeare (see 45 A.B.A.J. 143, 237, 700 and 704).

The works of Shakespeare represent the highest achievement of the human spirit in our modern civilization. Only a transcendently great mind could have converted such a wealth of knowledge, emotion, experience, philosophy, idealism and tragedy into poetic drama of such unsurpassed power and scope: only a great human being could have had so much to convert. Unlike the works of the somewhat later, professional playwrights, Marlowe, Jonson, Chapman, Greene, Peele, etc., the dramas of Shakespeare were not conventional plays written, then staged and crystallized. Based upon his beloved "old tales", always autobiographical and topical, they were—after having been performed in simple versions at court—continually revised and augmented, re-created from earlier forms, kept up to date: they were indeed "the abstracts and brief chronicles of the time", covering a period of thirty years and constituting in their entirety, as we now have them, an epic of the Elizabethan era, the Renaissance in England. (Ben Jonson rightly called Shakespeare "soul of the Age".) Composed as they were in the classical tradition, Shakespeare's dramas excel, for us, even the majestic epics and dramas of Greek and Roman history and legend, upon which he drew, as he did upon all the literature, all the learning, available in his day. This supreme poet of our race wrote from his early 'teens[1] until the close of his life when, after having shaped the final versions of his great tragedies, his dying hand hovered over Hamlet's plea to Horatio to vindicate his "wounded name", and added, "*The rest is silence.*" His poems and dramas, like the works of all truly creative writers[2] were, in the fullest sense, his life. It had to be so.

To those who can believe that the noblest works in our language—still vital and inspiring, gay, sophisticated, tragic, profoundly wise, a glory of literature—were the creation of a provincial butcher's apprentice who went up to London in his early twenties, became "a servitur in the theatre", then a minor actor, and some dozen years later returned to the dirty little village of Stratford to buy property, profiteer in grain and sue his neighbors for small sums of money, one need not appeal. They are satisfied with their miracle. They see Shakespeare as merely another playwright like the well-educated London writers who frequented the Boar's Head Tavern, and they regard his works as fiction presented in a vacuum, brilliant but with only a surface meaning, "objective".[3] To them it is not inconceivable that the grain-dealer whose hungry neighbors wished to hang him at his own door for hoarding corn, could write,

> Who steals my purse steals trash; 'tis something, nothing ...
> * * *
> By Jove, I am not covetous for gold ...
> But if it be a sin to covet honour
> I am the most offending soul alive.
> * * *
> The quality of mercy is not strain'd ...
> * * *
> Whether 'tis nobler in the mind to suffer
> The slings and arrows of outrageous fortune ...

They are not moved to protest as Coleridge did against this concept of Shakespeare: "I speak reverently, does God choose idiots by whom to convey divine truths to man?" Nor would they agree with Carlyle that Shakespeare was "the chief of all poets hitherto: the greatest intellect who, in our recorded world, *has left a record of himself* in the way of literature".

1. A few of his early poems survive, some signed with a pen-name, some with his own. See THIS STAR OF ENGLAND.
2. For example, like those of Byron, Tolstoy, even Dickens, and of Goethe, of whom Thomas Mann says that he "was consistently autobiographical. Even Faust and Mephistopheles are dialectical revelations of Goethe's own character and personality." The Victorian scholars seem to have been quite naïve in the matter of such psychological truths.
3. Professor Oscar James Campbell.

It is to the others—to those who know with Emerson that you may "use what language you will, you cannot say anything but what you are": mediocrity produces mediocrity and greatness greatness—that the following summary is addressed. It is addressed to those who wish at long last to pay honor to the noble genius who, aristocrat though he was, sacrificed all he had and all he was for his sovereign and for the country they both so deeply loved: "*This blessed plot, this earth, this realm, this England.*"

There are certain facts fundamental to a recognition of the identity of Shakespeare as Edward de Vere, 17th Earl of Oxford:

(1) The poet-dramatist was forced to be anonymous. This is the heart of his mystery, the cause of the continued controversy: his name was concealed, "buried".

(2) The motive behind the anonymity was the suppression of revelations he made in the plays. It is the Cecils' censored version of the Elizabethan era which has come down to us. In 1640, seventeen years after the First Folio was published, the author of *Wit's Recreation* wrote:

> Shake-speare, *we must be silent* in our praise,
> 'Cause our encomiums can but blast thy bays.

(3) Oxford had several reasons for choosing the name "Shakespeare"—or "Shake-hyphen-speare", as it was written on eighteen of the published quartos, on *The Phoenix and the Turtle* and on the first edition of the Sonnets. The name "Shakespeare" was originally published on *Venus and Adonis*, which he called "the first heir of my invention"; *i.e.*, of my *pen-name*, for of course this elaborate poem was not Shakespeare's initial literary work. (Since the confusion was first deliberately instigated, the Stratford man has often been called Shakespeare, but his name was Shaksper—probably derived from Jacques Pierre.)

(4) Oxford had the characteristics and qualifications manifested by the supreme poet of the English race—that is, by Shakespeare.

(5) Contrary to the belittling statements of those who endeavor to whittle him down to fit the specifications of their false premise, Shakespeare's classical learning was wide and comprehensive. He has been accused of "borrowing" from others when actually he was revising his own early, anonymous works. (Nothing is to be gained by laboring the point that perhaps John Shaksper *could* write his name, although he preferred to make his mark instead, or by asserting that he had been bailiff of the town—it is recorded that he was one of those who "come not to churche for feare of processe for debt" and that he was fined for having filth in front of his door—for he and his wife and William Shaksper's wife and daughter were illiterate; while the poet Shakespeare was obviously a product of the highest culture the western world afforded. No one ever referred to Shaksper during his lifetime as the author of anything.)

(6) Shakespeare's vocabulary and contribution to the language were phenomenal.

(7) Oxford's experience in theatrical production and acting was wide and varied.

(8) Contemporary comment which escaped Burghley's censorship reveals Oxford to have been a great man, beloved of the Queen, a distinguished patron of the arts.

(9) Both Shakespeare and Ben Jonson portray the Stratford man, Shaksper, showing him a brash, ambitious yokel.

(10) The Introduction to the First Folio perpetrates a hoax.

I.

Edward de Vere, 17th Earl of Oxford, hereditary Lord Great Chamberlain and Companion to the Monarch, was forced to bow to the fiat of anonymity. But in the ardent hope that his "good name" would be known to posterity, he filled both plays and sonnets with unmistakable clues to his identity. Wordsworth was right about the sonnets: "With this key Shakespeare unlocked his heart."

In Sonnet 76 the poet puns on his name, E. Vere, or E. Ver, as it was sometimes spelled:

> Why write I still all one, *ever* [E. Ver] the same,
> And *keep invention in a noted weed*,
> That *every* [E. Ver-y] word doth *almost tell my name*,
> *Showing their birth and where they did proceed?*

"Every word" almost tells his concealed name, E. Ver. The "noted weed", or garment, in which he clothes his verse is the true story that he relates in all he writes. (If the poet had been a recognized playwright named Shakespeare, this sonnet would be meaningless.)

In No. 81 he promises the Fair Youth immortality:

> Your name from hence immortal life shall have,
> *Though I*, once gone, *to all the world must die.*

It is ordained that the world must not know that Edward de Vere was Shakespeare. (There was no reason why the Stratford man's name "must die", if his work had merited immortality. Marlowe's name has lived in his work, for all of which he has received credit.) De Vere was jealous of his great name, the most illustrious in England, and he felt the obligation it entailed. His highest wish was to do it honor, as his ancestors had.

In No. 36 he says to the Fair Youth, who is his son:

> I may not evermore *acknowledge thee*,
> Lest *my bewailed guilt* should do thee shame.

When the Queen, seventeen years his senior, had seduced the young courtier, he had given her a son, "a little western flower";[4] the "bewailed guilt" was his, for she, an absolute monarch, preferred to pass on, "In maiden meditation, fancy free", preserving her legend. Through the machinations of the Cecils,

4. See THIS STAR OF ENGLAND. Oxford's literary friends knew about his son by the Queen. Jonson, Nashe, and Harvey wrote about it as boldly as they dared. Thomas Nashe dedicated his *Choice of Valentines* to Southampton, thus:
> Pardon, sweet *flower* of *matchless poesie*,
> The *fairest bud* the *red Rose ever* bore,
> Ne blame my verse of loose *unchastity*
> For painting forth *the things that hidden are.*

He alludes to the "little western flower", the subject of the "matchless" sonnets, who is the *Fair* Youth, the loveliest *flower* the red Rose—*i.e.*, the Lancastrian or Tudor Rose, Elizabeth—bore E. Ver. And he apologizes for repeating what is forbidden. (Southampton ignored the dedication and the impertinence.)

Francis Bacon and their followers the legend has been fairly well preserved, though Elizabeth Tudor was no more a virgin than her father had been.

In No. 71 he counsels his son to forget him after he is dead:

> Do not so much as *my poor name* rehearse,
> But let your love, even with my life, decay.
> Lest *the wise world* should look into your moan
> And *mock you with me* after I am gone.

The bitterness of his sacrifice is here. His great name has been made a mockery.

No. 72 expresses the deep melancholy of renunciation:

> *My name be buried* where my body is,
> And live no more to shame nor me nor you.
> For *I am sham'd by that which I bring forth* . . .

He was shamed by being unable to acknowledge either his son or his work. Here is the final tragedy of the noble poet. His name was indeed "buried". How poignant it is when the truth is known!

Shakespeare was a generation older than the Fair Youth, as he says in Sonnet 2. (Shaksper was ten years older.) Oxford was born in 1550.

The first seventeen sonnets are clearly dynastic.

II.

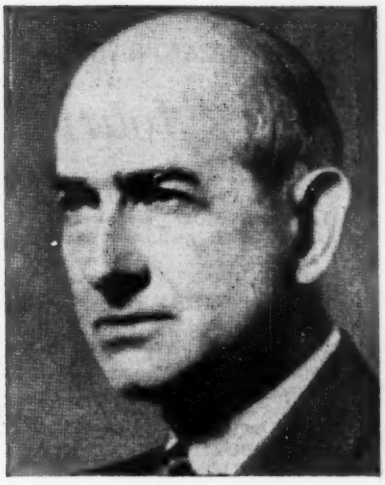
The motive for the enforcement of Oxford's anonymity stemmed from the autobiographical and topical content of his poems and plays, the candid revelations they contained. Like Hamlet's, his players were "the abstracts and brief chronicles of the time". He knew everything, and he told everything, as exuberant genius does, without reservation. He did this sometimes symbolically, sometimes with astonishing literalness, always fearlessly. Although working in the Queen's service and with her strong support ("I serve Her Majesty", he wrote Burghley in 1583, "and I am that I am"[5]), he told the truth about her too. Regarding himself as his sovereign's defender—her Spear-shaker in the field of literature, as his ancestors had been on the battlefield—he wrote certain plays to warn, or to "catch the conscience of" the Queen.

No one in the kingdom except Elizabeth's premier Earl, her "chiefest courtier" and favorite, would have been allowed to portray on the stage the deposition of an English monarch, as Shakespeare did in *3 Henry VI* and in *Richard II*. (Sir John Hayward, for writing a history of the usurper Henry IV spent years in the Tower under sentence of execution and was released only through the intervention of Essex. Stubbes, for writing a pamphlet against the French marriage, had his right hand cut off.) *3 Henry VI* was written to warn the Queen about her "too much lenity" to villains; *Richard II* subsequently stressed the warning: "A thousand flatterers sit within thy crown. . ." —both these at times when she was succumbing to the blandishments of certain wily schemers at court. Although she was angry, she admitted the imputation: "I am Richard, know ye not that?" she snapped. But she took no action against "her Turk", as she called him. She knew he had her welfare at heart. However, the public was not aware that a man so near Her Majesty, so well-informed, had written this.

(It is inconceivable that Elizabeth Tudor would have permitted a common playwright such license. *This fact alone is enough to dispose of the Stratford thesis.*)

Oxford's anonymity was preserved and perpetuated by William Cecil's determination to prevent both the general public and posterity from learning the truth. He had the excuse of protecting the Queen's legend and a state secret; but he was no less desirous of protecting his own reputation as "the great Lord Burghley". Cecil had power of absolute censorship over the record of the era—"Everything", says Hume, "passed through his hands"[6]—and his son Robert Cecil with his kinsman Francis Bacon continued the censorship, while the Stuarts naturally supported Elizabeth's legend and the secret

(Continued on page 990)



Dorothy Ogburn is the author, with her husband, of *This Star of England*, a study of the authorship of the Shakespearean plays. Born in Atlanta, Georgia, she is the author of several books, articles and book reviews.

Charlton Ogburn has practiced law in New York and Washington since 1921. A native of Georgia, he was admitted to the Georgia Bar in 1905 and practiced in Savannah. He has taken part in bar association and other civic activities.

5. *Cf.* Sonnet 121, line 9. He speaks also of his "sportive blood". If Burghley in spying on him, "levels at my abuses", he "reckons up his own".

6. In 1840, David Jardine, a lawyer and student of the Gunpowder Plot, wrote: "When such artists as Bacon and Cecil framed and propagated a State fiction in order to cover a State intrigue, they took care to cut off or divert the channels of history so effectually as to make it hopeless, at the distance of three centuries, to trace the truth by means of documents which had ever been in their control."

AMERICAN BAR ASSOCIATION

Journal

TAPPAN GREGORY, *Editor-in-Chief*.....Chicago, Ill.
LOUISE CHILD, *Assistant to the Editor-in-Chief*.....
.....Chicago, Ill.

BOARD OF EDITORS

ROBERT T. BARTON, JR.....Richmond, Va.
ALFRED J. SCHWEPPE.....Seattle, Wash.
GEORGE ROSSMAN.....Salem, Ore.
RICHARD BENTLEY.....Chicago, Ill.
EUGENE C. GERHART.....Binghamton, N. Y.
ROY E. WILLY .....Sioux Falls, S. Dak.
E. J. DIMOCK .....New York, N. Y.
ROSS L. MALONE, *President of the Association*.....
.....Roswell, N. M.

SYLVESTER C. SMITH, JR. *Chairman of the House of Delegates* .....Newark, N. J.
HAROLD H. BREDELL, *Treasurer of the Association*....
.....Indianapolis, Ind.

General Subscription price for non-members, $5 a year.
Students in Law Schools, $3 a year.
American Law Student Association members, $1.50 a year.
Single copy price, 75 cents; to members, 50 cents.

EDITORIAL OFFICES

1155 East 60th Street.....Chicago 37, Ill.

Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Keeping Pace With the Law

The *Wall Street Journal* recently expressed editorial sympathy for lawyers desperately trying to find out what the law is. The reason for this rather rare expression of solicitude for the lawyer's problem was the recent Supreme Court decision setting aside the New York censorship of the movie *Lady Chatterly's Lover*. In the editor's opinion, "Supreme Court opinions that leave the law in such disarray must spread woe among those who must later come before its bar." The Court has given some aid and comfort to its critics in this respect. One former Supreme Court Justice's law clerk has pointed out in a humorous vein that in *Roger* v. *Missouri Pacific Railroad Company*, 352 U. S. 500 (1957), every Justice on the Court dissented, in part at least—"a unanimous dissent"! Such manifest uncertainty in judicial decisions makes legal prediction a difficult task.

Jeremy Bentham claimed that the uncertainty in the law was "the mother of fees", so perhaps from a selfish point of view we of the Bar should not protest too much. Yet law that is unknowable is tyranny and not law at all. Mr. Justice Holmes' definition of law is worth repeating here. He said, "The prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law". Roscoe Pound has emphasized that, "Law must be stable, yet it cannot stand still".

Since the law cannot stand still, neither can our Constitution. Marshall envisaged that great document as one to endure for ages, to be adapted to various crises in the affairs of men. He wrote that "A Constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it". It is the speed at which the law has moved forward in recent years which has disturbed lawyers trained to respect the doctrine of *stare decisis*. The pace of the law's progress is important.

Uncertainty is one of the laws of life. Lawyers must keep up not only with developing law, but with developing life. The necessities of our times increase the pressures on our judges and, of course, on the lawyers who must interpret their decisions. The pace of change in the law increases as the pace of change in modern life increases. The better ordering of life requires readjusting interpretations of the law as a reasonable substitute for force and war. The very uncertainty of the future of the law is what enables it to progress in accordance with those "felt necessities" which Holmes said have much more to do with the shaping of the progress of the law than logic.

We cannot sidestep these great philosophic truths when we meet up with them in our own generation. It should hearten every lawyer to realize that in all fields of human knowledge and experience, uncertainty always faces man as he faces the future. We shall find that intelligence and courage are our best allies as we face the uncertain years ahead both in law and in life.

9th Annual Tulane Tax Institute

The Ninth Annual Tulane Tax Institute will be held in New Orleans on November 4-6 at the St. Charles Hotel. The opening lecture by Robert Anthoine will review current developments in federal income tax and multi-state taxation of commerce. The program will feature Sub-chapter "S" and other corporate business problems. Special sessions will be devoted to oil and gas, accounting problems and to business and family transactions. For further information write to Tulane Tax Institute, Tulane University School of Law, New Orleans 18.

A Sequel:

The Bar Is Not Overcrowded

by **Reginald Heber Smith** • *of the Massachusetts Bar (Boston)*

From every point of view, therefore—from that of vocational guidance, bar examination grading, law school standards, and proposals for limiting admissions—it is important to ascertain by the most thorough possible study whether or not there is any clear evidence of overcrowding.
—Lloyd K. Garrison

The figures for new admissions to the Bar in 1957 have just been published by *The Bar Examiner*[1] so that it is now possible to complete the table presented in the November, 1958, issue of AMERICAN BAR ASSOCIATION JOURNAL.[2]

Admissions to the Bar in 1957 totalled 9,592 which was an increase of 142 over the admissions in 1956. But the population had jumped by more than 5,000,000 to 172,550,000 at the end of 1957[3] so that admissions per million of population decreased for the ninth consecutive year. The revised table appears as Table I.

An analysis of admissions by states is revealing.

In twenty-two states the number of admissions declined as shown in Table II.

In eight states, although 1957 admissions did not decline from those in 1956, they were fewer than in 1955, as shown in Table III.

The states showing substantial increases are listed in Table IV.

Lawyers like words and dislike statistics. Yet the latter are as important as the former in ascertaining and stating truth. The question "How many lawyers are there in the United States?" cannot be answered by saying "Too few" or Too many".

One illustration will make clear why we must obtain and maintain the basic facts about the legal profession.

The United States Department of Labor publishes each year its *Occupational Outlook Handbook*. The section dealing with law is submitted each year in draft form by the Commissioner of Labor Statistics to a number of lawyers, including the President of the American Bar Association, for criticism and correction. For ten years it has been my privilege to submit suggestions and I am happy to report that in my first letter to the Commissioner written January 28, 1948, I said, "Your Summary is too pessimistic." At that time we had no reliable figures to give to the Commissioner to rebut the widely held impression of "overcrowding". In the absence of records and statistics the young men and women in our country had to accept hearsay evidence in choosing their careers.

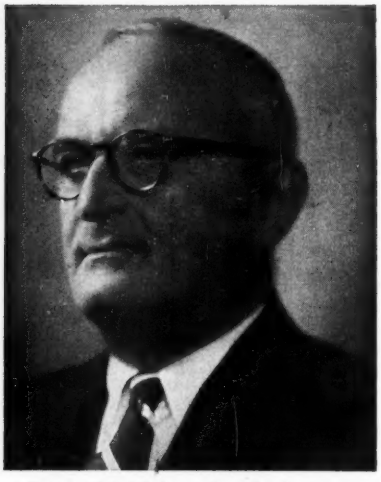
How much damage resulted is not known and cannot be measured, but it may be significant that early in 1958 the Institute of Life Insurance published the career choices of 12,000 top-ranking high school students as

Table I

Year	Total Students In Law School	Total Number Admitted to Bar	Population	Admissions per Million
1949	56,102	13,344	150,000,000	89
1950	51,695	13,641	152,000,000	89
1951	46,037	13,141	154,000,000	85
1952	44,981	11,900	157,000,000	76
1953	42,548	10,976	159,000,000	69
1954	42,762	9,928	161,000,000	62
1955	40,158	9,587	164,000,000	58
1956	42,089	9,450	167,000,000	57
1957	41,781	9,592	172,500,000	55

References: The words in the headnote were written by Mr. Garrison in 1935 while Dean of the University of Wisconsin Law School in an article *A Survey of the Wisconsin Bar* published in 10 WISCONSIN LAW REVIEW 131.

1. 27 THE BAR EXAMINER, 94-99 (September-November, 1958).
2. 44 A.B.A.J. 1054 (November, 1958).
3. The earlier population figure of 171 million for 1957 was revised upward to 172,554,000 at the end of 1957. See United States Department of Commerce *Survey of Current Business* for May, 1958, Table S-11.



Reginald Heber Smith has practiced law in Boston since 1914. He is one of the pioneers of the Legal Aid movement in the United States and served as Director of the Survey of the Legal Profession. He was awarded the American Bar Association Medal in 1951.

reported by the National Association of Secondary School Principals:

Teaching	30.0%
Sciences	27.4%
Medicine	13.3%
Business	7.0%
Communications	2.5%
Law	2.2%
Others	17.6%

Fortunately the future should be much brighter because we now have the American Bar Foundation[4] which can, day in and out, year in and out, collect the essential factual material about the legal profession, analyze it and make it available to us and to all our fellow-citizens.

Table II

State	1956	1957	State	1956	1957
Colorado	138	123	Nevada	22	11
Connecticut	207	134	New Mexico	34	32
Delaware	19	12	Oregon	107	89
District of Columbia	444	399	Pennsylvania	372	348
Georgia	83	79	Rhode Island	39	35
Idaho	19	17	South Carolina	54	26
Indiana	149	116	South Dakota	32	25
Iowa	89	88	Utah	48	43
Kentucky	78	72	Virginia	212	162
Michigan	451	317	Washington	128	122
Mississippi	52	39	West Virginia	50	48

Table III

State	1955	1956	1957
California	814	733	794
Maine	30	24	24
Maryland	270	193	214
Massachusetts	458	372	428
Montana	32	28	31
New Hampshire	22	15	21
New Jersey	258	177	180
North Carolina	123	118	119

Table IV

State	1955	1956	1957
Arizona	55	62	85
Florida	261	325	332
Illinois	532	544	567
Kansas	105	108	146
Minnesota	154	145	199
Missouri	197	185	216
Nebraska	54	46	72
New York	1,586	1,584	1,662
Ohio	513	457	526
Oklahoma	121	151	164
Texas	420	507	556

4. See, for example, the Foundation's excellent Compilation of Published Statistics on Law School Enrollments and Admissions to the Bar 1889-1957 issued November 6, 1958. It correctly estimated that the number of admissions in 1957 would exceed those of 1956. Its estimate was 9,699 against the actual number of 9,592.

NOTE: The statistics in this article deal with *new* admissions. They *exclude* admissions of foreign attorneys on motion. They *include* admission by diploma in the few states where the law permits such admission. Also they *include* persons admitted without examination under "emergency" rules relating to veterans or persons entering military service.

Damper or Bellows?

Antitrust Laws and Foreign Trade

by **Wilbur L. Fugate** • *of the Virginia and West Virginia Bars*

In this article, Mr. Fugate sets out to answer critics who charge that application of our antitrust laws to foreign trade hurts our foreign policy. The evidence is all to the contrary, he asserts, and applying such laws to foreign trade has been strongly supported both by Congress and the Supreme Court.

In the September, 1958, issue of the AMERICAN BAR ASSOCIATION JOURNAL, Mr. Linowitz severely criticized the application of the United States antitrust laws to our foreign trade. He referred to "widespread opposition" to the impact of recent foreign trade antitrust decisions and set forth the contentions that the present application of antitrust to foreign trade hurts United States foreign policy with respect to aid to underdeveloped countries, may discourage foreign trade and investment abroad, and intrudes upon the internal affairs of other countries. It is the purpose of the present article to examine the rationale and bases of applying our antitrust laws to our foreign trade.

The basic antitrust law, the Sherman Act,[1] enacted in 1890, expressly prohibits restraints upon and the monopolization of foreign as well as interstate commerce. Congress subsequently passed an auxiliary statute, the Wilson Tariff Act,[2] in effect reiterating the Sherman Act provisions with respect to imports. Later, in 1918, Congress in the Webb-Pomerene Act[3] made a specific exception for export trade associations, but the sponsors of the bill were careful to explain that it was not intended otherwise to weaken the enforcement of the Sherman Act as to foreign trade.[4] In fact, this statute broadened the Federal Trade Commission Act to cover activities abroad.[5] More recently, in the Thye Amendment to the Mutual Security Act, Congress recognized "the vital role of free enterprise in achieving rising levels of production and standards of living essential to the economic progress and defensive strength of the free world", and declared it to be the policy of the United States, among other things, "to foster private initiative and competition", and "to discourage monopolistic practices" in international trade.[6]

The Chairman and Chief Counsel of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee in 1955 held conferences abroad at which representatives of the American Chamber of Commerce in London and of other Chambers of Commerce abroad stated their views as to the adverse effects abroad of the application of the antitrust laws to United States foreign trade.[7] Despite such protests, there does not appear to be any general support for relaxation of the antitrust laws as applied to foreign commerce. Contrary opinions to those of the London Chamber were expressed by others at the Subcommittee Hearings of which the foreign conferences were a part. For example, the representative of the Department of State gave four reasons why that Department believes that our policy of free competition is important to our foreign relations: (1) cartels "accompanied by fixed higher prices, discouragement of new investment, and a static rather than expanding economy, have a restrictive effect on the world economy"; (2) our policy of free competition encourages other countries to strengthen competition in their economies; (3) this policy enables us to "protect and promote our industry and commerce abroad"; and (4) it contributes to the respect with which American industry is held in the world and shows our aim is "not to exploit, but to compete, openly and fairly, to bring more and better goods and services to others at more reasonable prices".[8]

The present Chairman of the Senate Antitrust Subcommittee, Senator Kefauver, in a statement last year con-

The opinions expressed herein are those of the writer and are not necessarily those of the Department of Justice.

1. 15 U.S.C. §§1, 2 (1952, Supp. IV 1957).
2. 15 U.S.C. §§8-11 (1952).
3. 15 U.S.C. §§61-65 (1952).
4. 5L Cong. Rec., part 1, pages 172, 173 (1916).
5. 15 U.S.C. §§64, 65.
6. 22 U.S.C. §1933 (1952, Supp. IV 1957).
7. *Hearings Before the Antitrust and Monopoly Subcommittee of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess, part 4, Foreign Trade, pages 1849-1904 (1955).
8. *Id.* at 1842 (Testimony of Mr. Kalijarvi).

trasted the "traditional American ideal, made famous by the late Henry Ford, of making profits through high volume and low profit margins, as opposed to the European cartel pattern of restricted volume and high profit margins". He went on to say that the inevitable result of cartel behavior "is reduced consumption, lower living standards, and unemployment".[9] In the 1957 hearings on the Emergency Oil Lift Program, Senator O'Mahoney who presided, stated:

> To me the whole significance of this hearing and other hearings that are going on is whether or not we are going to be driven into a cartel system which is absolutely opposed to the American system, of which we are so proud, in developing opportunity in industry by competition.[10]

The Attorney General's National Committee To Study the Antitrust Laws, "reject[ed] any proposal for blanket exemption of foreign commerce from the antitrust laws".[11] While it took the position that the Sherman Act should apply "only to those arrangements between Americans alone, or in concert with foreign firms, which have substantial anticompetitive effects on this country's trade or commerce . . . with foreign nations, as to constitute unreasonable restraints",[12] it is clear from the Report that the Committee did not consider that the courts had abandoned this standard.[13] The National Association of Manufacturers has taken a position similar to that of the Attorney General's Committee, adding that the N.A.M. "believes the elimination of cartels by the nations of the free world would unleash competitive forces that would contribute to an increase in production, productivity and living standards".[14]

Judge Victor R. Hansen, then head of the Antitrust Division, pointed out last year that it is inaccurate to speak of the antitrust laws as "restrictive". "To the contrary", he stated, "the whole purpose of these laws is to free United States interstate and foreign commerce of restrictions imposed by private parties and to promote the free flow of commerce." Then he cited the results of two antitrust judgments, one freeing an American company and one freeing a foreign company of restraints of trade. At the end of a year's operation under the *SKF Industries* judgment, SKF, the American company, increased its foreign sales 33 per cent and its backlog of unfilled foreign orders 170 per cent. In the *ICI* case, the British company ICI increased its United States imports from half a million to five million dollars in the year following termination as ordered by the Court, of restrictive agreements with the American du Pont Company.[15] Judge Rifkind in the *National Lead* case, also concerned with foreign trade, expressed the same idea: "To prohibit adherence to conspiratorial trade restraints hampers trade in about the same way that the prohibition against the circulation of counterfeit money hampers it. It may prevent the consummation of a particular transaction but in the long run it frees business from private regimentation and secures it against those who would trammel it."[16]

Jurisdiction and Foreign Policy

It has been argued that United States courts in antitrust cases have exercised "extraterritorial jurisdiction" contrary to international law and that this policy offends other nations.[17] The courts, however, have emphasized that protection of United States commerce has been a rightful basis for jurisdiction in such cases. In an early antitrust case, involving a steamship route between the United States and Canada, defendants contended that this international commerce was outside of United States jurisdiction.[18] The Supreme Court pointed out that if this contention were accepted, neither the United States nor Canada would have jurisdiction and defendants' activities would be immune from both laws.[19] In the *Sisal* case[20] where defendants had gained control in Mexico of the supply of sisal, a plant used for binder twine, and thus became the sole importer of sisal into the United States, the Court stated that "the fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein". It was stressed that "the United States complains of a violation of their laws within their own territory by parties subject to their jurisdiction".[21]

Nevertheless, it is not a justification that activities which are part of a conspiracy to restrain or monopolize United States trade are legal where done. This would afford too easy a way to evade United States laws. In the 1911 *American Tobacco* case,[22] defendants argued that the British Imperial Tobacco Company "entered into a contract with the American Tobacco Company in London, where such a contract was a legal and proper one".[23] The Supreme Court was not persuaded by this argument. Judge Learned Hand, in the *Alcoa* case[24] summed up the rationale behind the enforcement of our antitrust laws in foreign commerce to include acts abroad directly and substantially affecting that commerce. While stating that the Sherman Act should not be read "without regard to the limitations customarily observed by nations in the exercise of their powers", he considered that "it is settled law . . . that any state may impose liabilities, even upon persons not within their allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends".[25]

An exception to the Sherman Act has been recognized by the Supreme Court with respect to acts of a foreign government. Acts required by foreign law or directed by a foreign government are

9. Press Release of March 11, 1957.
10. *Joint Hearings Before Subcommittees of the Senate Committee on the Judiciary and Senate Committee on Interior and Insular Affairs on the Emergency Oil Lift Program and Related Oil Problems*, 85th Cong., 1st Sess., part 1, page 70 (1957).
11. ATTY GEN. NATL. COMM. ANTITRUST REP. 66 (1955).
12. *Id.* at 76.
13. *Id.* at 66-76.
14. National Association of Manufacturers, INDUSTRY BELIEVES (1957).
15. Hansen, *The Impact of the United States Antitrust Laws on Foreign Trade and Investment*, Address before the Washington Foreign Law Society, May 10, 1958.
16. *United States* v. *National Lead Co.*, 63 F. Supp. 513, 531 (S.D. N.Y. 1945) *aff'd.*, 332 U. S. 319 (1947).
17. See *e.g.*, Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L. J. 639 (1954).
18. *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87 (1913).
19. 228 U. S. at 106.
20. *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927).
21. 274 U. S. at 276.
22. *United States* v. *American Tobacco Co.*, 164 Fed. 700 (S.D. N.Y. 1908), *revd. and remanded*, 221 U. S. 106 (1911).
23. 164 Fed. at 703, 221 U. S. at 134.
24. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).
25. 148 F. 2d at 442-443. See also RESTATEMENT, CONFLICT OF LAWS, §65.

not subject to the Sherman Act, unless parties to a conspiracy use foreign laws or regulations to further an illegal conspiracy to restrain United States trade.[26] Accordingly, despite the criticism of antitrust enforcement in foreign trade as intruding upon foreign sovereignty, conflicts with foreign law have been rare. The *ICI* case[27] is often cited as an example of a conflict with foreign law but even there the British Court of Appeal recognized that it was entirely proper for a court to order a person before it "to do or refrain from doing something in another country affecting the other party to the action".[28] The American court considered that defendants ICI and du Pont had contrived to place certain patents beyond the court's control by an assignment to the British company BNS, a joint subsidiary of ICI and Courtaulds, also a British company. The British trial court made no such finding, and would not enforce a decree involving the rights of third parties not before the American court.

It is true that there have been occasional protests from foreign governments with respect to the assumption by United States courts in antitrust suits of jurisdiction over their nationals.[29] Since in all cases this is predicated upon such nationals carrying on business in the United States, the answer, as stated by Judge Ryan in the *ICI* case, is that a foreign company which "has received the benefit of the laws of the United States . . . must expect to be required to answer for their breach".[30] As to the contention made in another antitrust case now pending in the Southern District of New York, that foreign law prevented foreign defendants before the Court from answering interrogatories, Judge Walsh replied that "We can't be expected to yield to the laws of all the various countries of the world, and we would not expect them to yield to ours."[31]

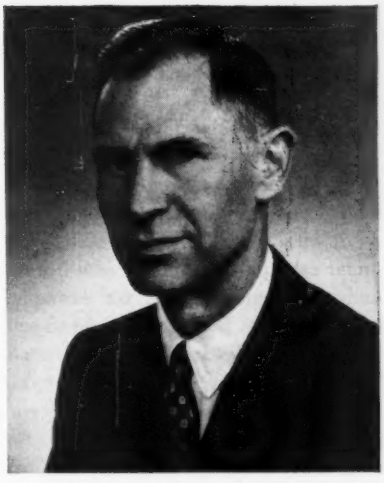
In a speech at the American Bar Association in London in 1957, Judge Hansen stated that the Department of Justice is always cognizant of the fact that antitrust proceedings involving activities abroad may affect a variety of related interests and programs, and also our foreign relations. He said: "It is our job to know what these interests are, and to carefully weigh them before any action is taken."[32] Judge Hansen described the procedure in effect whereby "in all instances, where appropriate, we consult with the officials of other Government agencies such as the Departments of State, Defense and Commerce, to coordinate antitrust with existing policies and with the best interests of the Government".[33] He emphasized that the United States in its antitrust suits "has never sought to intrude upon the sovereignty of other nations".[34]

Foreign Subsidiaries and Licensing Arrangements

Two areas in which companies doing business abroad have expressed particular concern as to the enforcement of the antitrust laws are the operation of foreign subsidiaries, and foreign licensing arrangements. The *Timken*[35] and *Minnesota Mining*[36] cases, in the view of some, cast doubt upon the use of subsidiaries in foreign trade. A careful reading of these cases, however, indicates that no question is raised of the validity of a single American company doing business abroad through wholly owned subsidiaries and making normal policy decisions, for example concerning price and area of operation. Antitrust problems are raised as to joint operations abroad between competitors, including the holding of stock interests in competing foreign companies. The mere fact of the joint arrangement, however, does not brand it as illegal, but legality will turn upon its purpose and competitive effect. And unless there is a direct and substantial effect upon United States interstate or foreign trade, such operations do not fall within the Sherman Act at all.

It may generally be stated that where joint companies are a vehicle for two or more competitors to engage in prohibited practices such as price fixing or market allocation, the joint operation will be held invalid. In *Minnesota Mining*, a group of dominant American exporters agreed to establish joint foreign factories to serve foreign markets and no longer to export to such markets from the United States. The court pointed out that these restrictive arrangements not only restrained the participants' own exports, but also adversely affected other American exporters.[37] In *Timken*, the defendant set up joint arrangements with foreign competitors as a justification for agreements not to compete. The Court disposed of this argument in summary fashion.

As to licensing arrangements, it



Wilbur L. Fugate has been with the Department of Justice since 1948. He is a graduate of Davidson College (B.A. 1934), the University of Virginia (LL.B. 1937), of George Washington University (LL.M. 1951, S.J.D. 1954). He served as an officer in the Coast Guard during World War II and is the author of *Foreign Commerce and the Antitrust Laws* (Little, Brown & Co. 1958).

26. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909); *United States v. Sisal Sales Corp.*, 274 U. S. 268 (1927).
27. *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S.D. N.Y. 1951), 105 F. Supp. 215 (S.D. N.Y. 1952).
28. *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.* [1952] 2 All E.R. 780, 782, 783 (C.A.).
29. See *e.g.*, *In re Investigation of World Arrangements*, 13 F.R.D. 280, 289 (D.D.C., 1952) (representations by British Government as to a British company); *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 2d Sess., Ser. 14, part 6-B, pages 7-14 (representations by Canadian Government as to a Canadian company).
30. *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504, 511 (S.D. N.Y. 1951).
31. *United States v. Watchmakers of Switzerland Information Center, Inc.*, Civ. 96-170, S.D. N.Y., unreported Opinion of Judge Walsh, February 19, 1957.
32. Hansen, *The Enforcement of the United States Antitrust Laws by the Department of Justice to Protect Freedom of United States Foreign Trade*, 11 A.B.A. ANTITRUST SECTION REP. 75, 76 (1957).
33. *Ibid.*
34. *Id.* at 87.
35. *Timken Roller Bearing Co. v. United States*, 341 U. S. 593 (1951).
36. *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).
37. 92 F. Supp. at 961.

should be recognized, preliminarily, that patents in different countries, although covering the same invention, are entirely separate; the patents of one country confer no legal rights in another country. If an American company owning an invention has both United States and foreign patents thereon it may grant independent licenses under each patent. A grant of a license under a French patent, for example, would give the licensee no right to sell the patented article in the United States. Conversely, a license under the United States patent would give the licensee no right to sell in France. So long as an American company licenses its foreign patents and depends upon its United States patents for protection from a foreign licensee's competition, it does not run into antitrust difficulties. Restrictions on United States imports or exports, however, arrived at by agreement and going beyond legitimate patent rights, are not permissible under the antitrust laws, and such restrictive agreements have been struck down.[38]

When we come to unpatented technology, the courts have ruled that a grant abroad of rights therein will not support covenants not to compete in the United States in the sale of articles manufactured by such technology.[39] The rule may possibly be different as to a license under a secret process,[40] and as to the transfer of technology along with the sale of a business.[41] While the transfer of technology abroad has been encouraged by our Government, a transfer with restrictive conditions attached may well defeat the policy behind such encouragement, that is, to provide an incentive for friendly foreign nations to fully develop their resources and trade.

The principle of applying the antitrust laws to United States foreign commerce, including activities abroad, substantially affecting such commerce, has been strongly affirmed by both Congress and the Supreme Court. While, as noted by the Department of Defense, this may result in some inconvenience even to governmental activities such as foreign procurement, "the long term benefit to be derived from opposing combinations in restraint of trade . . . counter balances any advantages [of] . . . a less stringent application of antitrust principles . . ."[42] The Department of Justice, while following a policy of vigorous antitrust enforcement as to foreign trade restraints, has indicated its concern as to comity with foreign nations, as to other governmental policies and as to the problems of businessmen making a bona fide effort to comply with the antitrust laws in the face of sometimes different legal, political and economic conditions abroad. Doubt has been expressed, however, on this latter point, that foreign cartels could effectively operate in world trade if American companies refused to cooperate.[43]

38. See *e.g.*, *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951).
39. *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 313, *mod. and affd.*, 341 U. S. 593 (1951); *United States* v. *General Electric Co.*, 82 F. Supp. 753, 846 (D. N. J. 1949).
40. *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 219, *affd.*, 351 U. S. 377 (1956); but see *United States* v. *General Electric Co.*, 82 F. Supp. 753, 815 (D. N.J. 1949).
41. Compare *United States* v. *National Lead Co.*, 63 F. Supp. 513, 524, *affd.*, 332 U. S. 319 (1947), with *Thoms* v. *Sutherland*, 52 F. 2d 592 (3d Cir. 1931).
42. Atty Gen. Natl. Comm. Antitrust Rep. 92 (1955).
43. Testimony of Thorsten V. Kalijarvi, Acting Deputy Under Secretary of State for Economic Affairs, in *Hearings Before the Subcommittee on Antitrust and Monopoly*, note 7, *supra*, page 1842.

Pioneer Justice

Many of us have read about unorthodox judges of the early West, but few realize that the East also had its magistrates who were short on law but long on rugged individualism. Such a man was Judge Helm of Bath, New York. Of the old school of buff breeches and topboots, he was known to his companions around 1800 as a man of genial habits and generous hospitality who had been appointed Judge of the Court of Common Pleas. Although he was no lawyer, he possessed much common sense, intelligence, and good will so that he left a reputation of having been a good judge.

His initial charge to a jury, made on the occasion of the absence of the first judge, was said to be characteristic of the man and his opinions:

"*Gentlemen of the Grand Jury:*—In the absence of the first judge, it becomes my duty to address you. If you expect much of a charge you will be disappointed, as it will be nothing but a squib. I see among you many gentlemen who understand the duties of grand jurors better than I do. I need only say, then, you know your duties, go ahead and perform them. The sheriff has handed me his criminal calendar, by which it appears he has five poor devils in jail for various offenses; two of them for horsestealing. Now, gentlemen, there are grades of crimes and common sense would indicate that the punishment should be in proportion to the criminality of the offense, as exhibited by the circumstances of each case. That I suppose is the law; if it is not it ought to be so. You will understand what I mean by this, when I inform you that one of the scamps stole a slab-sided Yankee mare, while the other took a Virginia blood-horse. Two others are indicted for mayhem. One of them for biting off a man's nose, which I think exhibits a most depraved appetite; the other for gouging out a man's eye, a most ungentlemanly way of fighting. I hope you will look well to these fellows. The last is a poor cuss who stole a jug of whiskey. The article is so plentiful and cheap it may be had for the asking, anywhere, and stealing it is the meanest kind of offense, and deserves the severest punishment that the law will permit. The great men in Albany have made it our special duty to charge you in regard to private lotteries. What is the mighty crime involved in this business I cannot see, when hustling and pitching coppers is tolerated; but I suppose they know, and as the law makes it our duty, I charge you to look out for them. Sheriff, select two constables and march these men off to their duties."

A. P. S. Sweet

Rochester, New York

A Three Hundred Fiftieth Anniversary:

English Common Law in the United States

by **John Drinkwater** • ***of the English Bar***

On May 17, a tablet was dedicated in Jamestown Church, Jamestown, Virginia, commemorating the advent of English common law to the United States. In the following article, an English lawyer, who practices in London, discusses the origins and application of this law, now used in both countries.

The first charter granted to the Virginia Company of London in 1606 provided that the inhabitants of the colony about to be established in Virginia "shall have and enjoy all the liberties, franchises and immunities . . . to all intents and purposes as if they had been abiding and born within this realm of England". There have been frequent judicial decisions of the American courts which have referred to the advent of English common law to America. These generally contain some such words as those used in 1807 by Chief Justice Parsons in a case in the Massachusetts Supreme Court.

> Our ancestors when they came into this new world claimed that Common Law as their birthright and brought it with them, except such parts as were judged inapplicable to their new state and condition—the Common Law of their native country as it was amended or altered by English Statutes in force at the time of their immigration.

From the Norman Conquest

The law which the early colonists brought with them was an outcome of the Norman Conquest of Britain in 1066. Before this time the administration of the law in England had no national character. The greater part was of Saxon origin, but there were in effect three main bodies of law—the Wessex law, the Mercian law and the Dane law. The general characteristics of these were the same, but they were everywhere modified by the old local customs and were of great diversity. Thus in East Anglia on the death of a freeman the eldest son would inherit, whereas in Kent the property went to the youngest son on the basis that, being the youngest, he would be the more likely to be in need of support. The confusion was made worse by the fact that there was no central judicial system. Each shire had its own independent communal court in which its freemen dispensed justice in accordance with their own practice. Only in the cases of persons of the highest rank did the King and the supreme Council of the Kingdom, the Witenagemot exercise jurisdiction. The Normans retained the local courts but replaced the Witenagemot by the Curia Regis which was both King's Council and King's Court. This body exercised jurisdiction over all matters, criminal and civil, in which the King's interest was concerned. The Normans further imposed upon the land the feudal system of tenure.

Reforms a Century Later

About a century after the coming of the Normans, in the reign of Henry II, three major reforms took place. These were firstly the formation of a central Court to deal with all civil disputes between subject and subject in which the King's interest was not concerned; secondly Justices of the Curia Regis were sent out regularly on circuit to dispense justice in the shire courts—a practice which still continues; and thirdly the regular grant to a plaintiff of the royal writ to compel a defendant to appear before the King's Court. This removed the cause from local jurisdiction and had the effect of attracting suitors to the Royal Court. By these means the process began by which all the old laws and the new Norman law were gradually welded into one uniform body of judge-made and royal law which was of general application and became the common law of the Kingdom. The common law thus evolved was quite distinct from statute law, from equity and from those laws peculiar to certain classes of persons as for example the law merchant. Magna Charta was regarded when it was drawn up as simply a declaration of the common law—and as late as 1867 in a case in Massachusetts the

John Drinkwater, aged 34, was educated at Britain's Royal Naval College and served in the Royal Navy until he was invalided out a few years ago when he was a Lieutenant Commander. He did not go to a university but studied law at the Temple in London. He is now a barrister-at-law, practicing mainly in London where he lives. He is a cousin of the poet, the late John Drinkwater.

---

defendant pleaded in terms one of the provisions of Magna Charta by way of defense. Coke, who was Lord Chief Justice of England in the early seventeenth century, regarded the common law as the very incarnation of human wisdom; on the other hand at a Fourth of July celebration in 1801 held at Boston one of the toasts was "The Common Law of England: may wholesome statutes soon root out this engine of oppression from America."

To the early eighteenth-century descendants of those who imported common law into America the political liberties which it guaranteed became increasingly more vital as the Royal Governors attempted to enlarge their own powers and the King and Parliament began to trespass on what the colonies regarded as their own prerogatives. Further the many new contingencies, unprovided for by statute or local custom, forced the judges to go to the common law for rules of decision. In this way the first American lawyers developed to a considerable extent into masters of the common law, and nowhere else has it been more admirably studied.

Blackstone Prominent

It was at this stage of American legal development that Blackstone's *Commentaries* became so important. The fact that such a large mass of legal detail was made available in one work, in an interesting and easily mastered form, caused Blackstone's work to have a tremendous sale in eighteenth-century America. The *Commentaries* served as the principle means of the colonists' information as to the state of English law in general. It was a happy coincidence that Blackstone had addressed himself to the interested layman rather than to the trained lawyer, for this was the very type of person who used Blackstone's *Commentaries* in America, at a time when the legal profession was viewed with disfavor.

Blackstone was the first Professor of English Law, being appointed to the Vinerian Professorship in 1758. As such he became deeply interested in legal education and nowhere were his efforts in this direction more successful than in America, where his appointment inspired the foundation of several chairs of English law, one of which, established under the will of Isaac Royall who died in 1781, was subsequently annexed to Harvard Law School and has continued ever since. It may be added that not the least of Blackstone's services to America was to inspire, through his book, young James Kent to study law.

Influence Waning?

Useful though the importation of common law into America may have been to the eighteenth-century lawyers, and indeed down to the beginning of the present century, there are signs that its influence is declining. An examination of the influence of the principle of *stare decisis*, to take a single example, is revealing. In England the old rule of common law still applies with as much force as it ever had; a judicial precedent is not merely evidence of the law, but a source of it, and the courts are bound to follow the law that is so established; every court is absolutely bound by the decisions of all courts superior to itself and the House of Lords (the final court of appeal) is absolutely bound by its own decisions. This doctrine is based on the ground that it is essential for the law to be certain. The advantage to an English practitioner is that a working library of about seven hundred volumes of reports will cover English case law down to the present day, and a further five or six volumes a year will keep it up to date.

In America neither the Supreme Court nor the highest courts of the various states have ever held themselves to be absolutely bound by their own decisions. However, it is true to say that up till the beginning of this century such reversals were exceptional. But in 1910 in the Supreme Court Mr. Justice Lurton said "Whether [the rule of *stare decisis*] shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." The result of this gradual departure from the absolute rule has been to produce an unmanageable multiplicity of reports, the very copiousness of which has forced American courts further from regarding precedent as of binding authority.

Centralization in London

The system works satisfactorily in England chiefly because there is a small judiciary centralized in London who still go out on circuit as they have done since the thirteenth century. It is otherwise in America; New York alone has over one hundred Supreme Court and Court of Appeals judges. Over the whole country the number of judges approaches the proportions of an army. The diversity of their interpretations must eventually completely undermine the rule which is the most characteristic doctrine of the common law.

In 1901 James Bryce, then British Ambassador to the United States and himself a lawyer, was able to write that, though an immense mass of law had been turned out by Congress and the various state legislatures since their separation from England—and some of that law contained some bold experiments—yet the law of the United States remained (except in Louisiana) substantially English law. "An English barrister", says Bryce, "would find himself quite at home in any Federal or State Court, and would have nothing new to master except a few technicalities of procedure and the provisions of any statutes which might affect the points he had to argue." Even if that statement was true half a century ago it is doubtful whether it remains true today.

Next year the English Bar is returning the visit that the American Bar Association made to England in 1957. Those English barristers who are fortunate enough to take part in the visit will be able to test the truth of Bryce's statement for themselves.

The Three Judges:

A Picture of Judicial Temptations

by **Harold F. Porter, Jr.** • *of the New York Bar (New York City)*

Rouault's painting entitled "The Three Judges" serves as Mr. Porter's springboard for a discussion of Sir Matthew Hale's precepts on judicial conduct. Mr. Porter finds that the figures in the painting represent greed, prejudice and fear, and from history he takes examples of judges that have been the victims of these three corrupters.

In 1660 Matthew Hale, a highly gifted and widely learned serjeant-at-law who in eleven years would become Lord Chief Justice of England, was offered appointment as Lord Chief Baron of the Court of Exchequer. Although this meant the possibility of resuming a judicial career interrupted during the Protectorate, he had been anticipating such an offer with some disquiet and already had written in his *Private Meditations* some reflections entitled *Reasons why I desire to be spared from any place of public employment.*[1] Evidently he reconciled his doubts, for not long afterward he was again at his writing table, this time recording what he styled *Things necessary to be continually had in remembrance:*[2] eighteen rules of conduct which in his modesty he hoped would help him to be a good judge. One of them reads, "To be short and sparing at meals, that I may be fitter for business". Another, "That I be wholly intent upon the business I am about, remitting all other cares as unseasonable and interruptions"—to which he appended, "And, while on the bench, not writing letters or reading newspapers". Generally, though, the rules are less homely, as the following examples betoken:

> That in the execution of justice I carefully lay aside my own passions, and not give way to them, however provoked.
>
> That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.
>
> That in business capital, though my nature prompt me to pity, yet to consider there is pity also due to the country.
>
> That I be not biassed with compassion to the poor, or favor to the rich, in point of justice.
>
> That popular or court applause or distaste have no influence in anything I do, in point of distribution of justice.
>
> Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.
>
> If in criminals it be a measuring cast, to incline to mercy and acquittal.
>
> To abhore all private solicitations, of what kind soever, and by whomsoever, in matters depending.

Some of his precepts Hale recorded negatively. He understood fully the principles of justice which, step by step, were welding government by law instead of by men to the Anglo-American tradition. Indeed, he had struggled faithfully for them. But he was an experienced man of the world: he had studied toward holy orders; been at the point of trailing a pike as a soldier in the Low Countries; served as a member of the Westminster Assembly of Divines; sat in Cromwell's Parliament; made investigations in mathematics, physics, chemistry, anatomy and architecture; defended Archbishop Laud, the Duke of Hamilton, Christopher Love and been ready to plead for Charles I if that monarch submitted to the court. So he knew that those who actually apply these principles of justice day by day, to wit, the judges, are, as Mr. Justice Black would one day write,[3] "not essentially different from other government officials. Fortunately they remain human even after assuming their official duties. Like all the rest of mankind they may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal."

Judges, Hale knew, are no less susceptible than other men to greed, prejudice and fear. And too, he was realist enough to concede that men lose track of principles less quickly when the guides they have at hand are couched in terms of forbiddance rather than exhortation, in familiar examples instead of noble concepts. As for himself, he was determined never to be a judge

1. Lord Campbell, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND, Boston, Estes & Lauriat, 1873, Volume ii, page 203.
2. *Id.* at page 207.
3. *Green* v. *United States of America*, 356 U. S. 165, 198 (1958).

Museum of Modern Art, New York, Sam A. Lewisohn Bequest

Rouault's "The Three Judges"

with private likes and dislikes strong enough to prejudice him on behalf of one party or against another; or a judge whose personal cupidity renders him corruptible; or one who, though neither prejudiced as the first nor corruptible as the second, yet inclines by weakness of character to choose popularity whenever the price of justice is disfavor in the eyes of others. These three spectres he could not tolerate. His precepts must have served him well, for Lord Campbell describes him as not only the best Chief Baron but "one of the most pure, the most pious, the most independent, and the most learned"[4] ever to hold the office of Chief Justice. Three centuries after Hale set down his rules of conduct their substance is firmly embodied in our Canons of Judicial Ethics—and largely prohibitory in cast.

If through the medium of pen and ink and paper we have yet to improve upon the image of the three justices bequeathed us by Sir Matthew Hale, a French sage of our own time, Georges Rouault, has depicted them with indelible vigor through brush and paint and cardboard. Indeed, this tableau is called *The Three Judges* and for those happy ones unsatisfied with mechanically reproduced copies, the original hangs in the Museum of Modern Art in New York.[5] We should have a look at it.

Hale the judge and Rouault the artist complement each other. Had they been Renaissance contemporaries they might well have collaborated in one of those unliterary books so popular in that age when many could read only a little or not at all:[6] a story told by woodcuts each with a few accompanying words of explanation, such as Sebastian Brant's *The Ship of Fools*[7] or somewhat as Rouault himself has done with his *Miserere*. But within the infinite reaches of the quest for justice divergence in time and geography means little. In truth they have collaborated. Rouault is Hale's illustrator.

The illustration—if we may presume to style it so—is not large. It measures only 29⅞ by 41⅝ inches. Yet all the same we find ourselves stepping backward perhaps fifteen feet before this sombre composition of gouache and oil dominated by morbid reds, greens, blues and blacks appears fully integrated—about the distance, we note, from bench to dock, for the artist sees this tribunal through the prisoner's eyes. In the center against a green background shading into black, flanked by his two colleagues and taking up nearly half the scene, sits the presiding judge. His rotund bulk—or as much of it as is visible above the blue-covered bench—is robed in brownish red and supports, seemingly without the aid of a neck, a massive globe of a head that is coifed with a heavy judicial bonnet of black from which fuzzy white hair protrudes at the temples. But these and the white neck-piece fastened below some vestige of a chin are but props for his face, hued as his robe and round and bloated beneath a deeply lined forehead. He has a wide nose and thick lips thrust to a pout that makes a round arch of his mouth. Eyes that are white ellipsoids with enormous black pupils stare out over the courtroom. He is leaning slightly forward on one elbow, the fingers of both hands clenched on the bench with immobile tension. Here, in contrast with the cunning corruption of the judge on the left or the smug confidence betrayed by the personification of prejudice sitting on the right, is physical, emotional and moral deterioration inflicted by the gambit of survival on one who has played it ceaselessly throughout years of political pawnage. Here is a judge filled with trepidation lest he may have to vote on the verdict before he has managed to appraise "popular or court applause or distaste." Here is perturbation before a wager. This is the spectre Hale dreaded most: the presence of fear on the bench. And Rouault has him presiding.

Fear sat on the Queen's Bench November 20, 1581, at the treason trial of Edmund Campion. "The verdict had been decided many days before; the real judges and the real jury were in the Council room occupied with other business" though, we are told, "throughout the day the Chief Justice conducted the trial with an appearance of impartiality".[8] Campion was convicted and suffered martyrdom for his religion. Hale must have known of this and of other political trials like it. Both he and Rouault knew that of all

4. Lord Campbell, *op. cit. supra*, Volume ii, pages 171, 209.
5. Color reproductions may be purchased for 35¢ each from the Museum of Modern Art, 11 West 53d Street, New York 19, New York.
6. Rouault, Georges, MISERERE, New York, Museum of Modern Art, 1952, with preface by the artist and an introduction by Monroe Wheeler.
7. Brant, Sebastien, THE SHIP OF FOOLS, translated by Edwin H. Zeydel, New York, Columbia University Press, 1944.
8. Waugh, Evelyn, EDMUND CAMPION, Aylesbury (England), Penguin Books, 1953, page 159.

injustice the most sinister and facile is that in which popular clamor concurs.

The margin of the painting cuts off nearly half the judge on the right and he is partly hidden by the presiding judge but his portrait is complete. Its darker, duller shades (the brownish red of his robe and face has become blued) and the impromptu of its swifter lines (they are black and heavy) envelope him in an atmosphere of introverted detachment, even perhaps of isolation—product of his intense, personal bias. His face is complacent and smug. Half-closed eyes look down the long curve of his nose, over thin lips that purse his mouth into an upward arc. They remain focused distractedly on his right hand which rests easily on the bench—writing Hale's forbidden letter. His forehead is unlined, his hair black and smoothed down. Here are no signs of tension, no traces of doubt. Immunity to external ideas precludes that. Because his vote is already settled, waiting "till the whole business and both parties be heard" has become prolix formality, empty ceremony. His figurative self-removal from the proceedings finds symbolic expression in the actual removal of his biggin. For him the case has long since been closed.

His counterpart presided at the Scopes "evolution trial" at Dayton, Tennessee, during the hot summer months of 1925 and Clarence Darrow, who defended Scopes, devoted two chapters of his autobiography to describing the consequences[9]. William Jennings Bryan headed the prosecution. While the sessions were being held inside the courthouse large banners saying "Read Your Bible Daily" dangled from the ceiling over the bench and at other strategic points in the courtroom. After the trial had adjourned from the stifling courtroom to the lawn, a banner with letters two feet high shouted instructions to the jury in the same words and the judge "expressed great astonishment" at a defense motion for its removal. The trial had opened with an invocation by one Brother Twitchell and thereafter a court-appointed committee of church members saw to it that a new preacher was on hand for each session. Assorted local grandees were invited from day to day to sit on the bench beside the judge. The latter, Darrow tells us, "was much impressed with Mr. Bryan as a leader of the faith and when some question would be raised and argued he would adjourn court for a day or two to consider it and come in and automatically decide in favor of the mouthpiece of the fundamentalists". Interrupting proceedings to pose for new pictures, the judge allowed himself to be photographed hugging the Bible and statutes under one arm, the other "directing a preacher to invoke Divine wisdom in settling the momentous question between Charles Darwin and W. J. Bryan", and all the while being fanned by two policemen. One picture even showed the judge shaking hands with Bryan. The jury found Scopes guilty.

With certain perverse logic society inclines to resent venality more when practiced on an individual scale than when it has tainted an important segment of society—too few, perhaps, can share the spoils. And being thus exposed to closer scrutiny than his two colleagues—the threat to justice decreases with the meanness of disguise—the judge on the left endangers the administration of justice slightly less than they. Rouault recognizes this by subordinating the personal cupidity of this judge to the fear and prejudice of the other two: he makes one preside and accents the other with an inconspicuousness designed to contrast with the grotesque notoriety depicted in this judge. Hale, too, had feared bribery least, having promised himself merely "to abhore all private solicitations". The intense revulsion with which society greets corruption on the bench is reflected in the sinister, wolfish face of this judge. His nose, disproportionately long and pointed, is of a brownish red that matches his robe and mantle. His lips are thick and sensuous, but instead of an anxious pout or a conceited smirk, they settle firmly on the straight line that traces his determined, rapacious mouth. Both the lines and colors of his face give out a sulphurous odor of evil. Shadows of blue and chalky white fuse over angular cheeks, over the hideous, simpering eye (unlike the others this judge sits half in profile) that looks slyly upward toward the presiding judge. With thick, swift strokes of black, Rouault has turned this ghastly, jeering grimace into a mask of mockery and sham full of contempt for the presiding judge gripped by his dilemma of fear. Here as at the other end of the bench we see no hesitation over the judgment—it has been paid for in advance.

In 1618 Francis Bacon, knight, peer by the most flattering of patents, eminent lawyer, distinguished statesman, celebrated philosopher, became Lord Chancellor. Three years later he was standing trial by the House of Lords charged with accepting bribes from suitors in cases pending before him.[10] A committee of the House of Commons, inquiring under the direction of Sir Edward Coke into "the abuses of the Courts of Justice", had uncovered twenty-three proved instances. In one case Bacon had accepted "gifts" from both sides. At first he attempted to maneuver. Then, overwhelmed by the

Harold F. Porter, Jr., is an attorney for the Army's Corps of Engineers in New York City. He received his A.B. from Harvard in 1938 and his LL.B. from Cornell in 1941. He was a civilian attorney with the Office of Military Government in Germany from 1946 to 1948, and has practiced in upstate New York and in Missouri.

9. Darrow, Clarence, THE STORY OF MY LIFE, New York, Grosset & Dunlap (Grosset's Universal Library), 1932, pages 244-278.

10. Lord Campbell, THE LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND, New York, James Cockroft & Co., 1875, Volume iii, pages 76-95.

evidence massed against him, he confessed, surrendered the seal of his great office and threw himself on the mercy of his parliamentary judges. He was sentenced to pay a fine of £40,000 and to imprisonment in the Tower during the king's pleasure, and was disqualified from sitting in Parliament or coming within the verge of the court. Although before the year was out he received a general pardon, national indignation at judicial corruption had been unmistakably registered. And while we may pass over Bacon's sophistic insistence that gifts had never influenced his judgments, the gladness "in some things" which he expressed in his letter of confession addressed to the Lords on April 22, 1621, voices the hopes of all who would salvage the maximum from so painful an episode:

> The first is, that hereafter the greatness of a judge or magistrate shall be no sanctuary or protection of guiltiness; which, in a few words, is the beginning of a golden world.
>
> The next, that after this example, it is like that judges will fly from any thing that is in the likeness of corruption (though it were at a great distance), as from a serpent; which tendeth to the purging of the courts of justice, and the reducing them to their true honour and splendour.[11]

But this "golden world" Bacon foresaw seems still abuilding. In 1958 a congressional subcommittee investigating federal regulatory agencies was revealing similar practices by lay judges[12] while in one state the Senate sitting as a court of impeachment ousted a criminal court judge for contravening the Canons of Judicial Ethics by accepting a gift to whose cost law violators and a lawyer had contributed.[13]

Rouault did this painting in 1913 but he had begun several satires of judges as much as six years earlier (one is in the Art Museum in Portland, Oregon) representing them, to quote one critic, as "between the bear and the ass".[14] Granting the representation, we find it less easy to accept the interpretation commonly placed on these works which James Thrall Soby has expressed this way: "Judges were for him, as they had been for Daumier, symbols of bourgeois corruption, of justice become a travesty of itself through the callousness of the prosperous middle class".[15] Daumier's judges are not handled roughly; for him their dozing in court and their easy attitude are pretexts for joking.[16] Even with his lawyers, whom Daumier treats more harshly, we find neither bile nor rancor.[17]

Daumier had first-hand knowledge of the law courts and all his life judges and lawyers remained cherished models for his lithographs, drawings, watercolors and oils. Yet for Rouault judges were but a passing subject and we have nothing to indicate extensive contact with the everyday workings of the legal process. Not until many years after the period of his judicial satires, not until the time of Rouault's well-known litigation with the Vollard heirs over the disposition of 803 unfinished paintings which he had delivered to his late dealer, do we have evidence of any. And this experience, which was a far different thing from the criminal bench he depicted, was concluded to his "great satisfaction" by a 1947 judgment of the Paris Court of Appeals.[18] Though we must not correlate Rouault's personal interest and the eternal truth of his art, may we not ask this: if this very wise and deeply religious moralist had once imagined justice in the Western tradition as but routine travesty of an ideal could he at length have said, "I spent my life painting twilights. I ought now to have the right to paint the dawn"—and still have left the dawn unpainted? If Rouault once had "seen" judges as apes and bears would he not now have felt an overwhelming compulsion to correct the outward utterance of that early illusion? Was not his collaboration with Sir Matthew Hale—figurative though we must concede it to have been—rather an artist's translation of the prohibitory Canons of Judicial Ethics composed when painting the twilight seemed to him the truest means of begging man *not* to be a wolf to man?

Had Rouault painted the dawn he would not have lacked for models: Sir Edward Coke, Chief Justice, declaring to James I before whom he had been summoned to submit, "When the case happens, I shall do that which shall be fit for a judge to do";[19] American judges to whom Communism and all its works are anathema guaranteeing Communists on trial before them every legal right available under the very system of justice these defendants still conspire to destroy; Sir Thomas More, Lord Chancellor and saint, filling with wine from his own cellar the silver flagons sent him as a bribe, and returning them by the importuning suitor's servant with, "Tell thy master, friend, if he likes it let him not spare it";[20] or Sir Matthew Hale himself, "regarded by succeeding generations as a model of public and private virtue".[21] Where the Canons of Judicial Ethics reach the judicature there is no dearth of virtue. Apart from relatively few contumacies it is by those not subject to the canons that justice is most exposed to travesty.

The administration of justice is indivisible. By whatever title the judge or tribunal be designated, adjudicating personal and property rights imports meting out justice. With the constitutional guarantees of life, liberty and property in the professional keeping of lawyers,[22] the Bar has a continuing responsibility for the judicature. But vigilance over the professional Bench does not suffice alone. The Bar must press unremittingly for extension of the Canons of Judicial Ethics over every adjudicating body, whether administrative tribunal or court of record—which presupposes recruitment of the Bench from men and women inspired with that "spirit of a public service"[23] which only a true profession imparts. The Bar must strive with all its spirit to stamp out the unauthorized practice of "justice". It must exorcise the administration of justice of the spectres of Hale's three judges.

---

11. Spedding, James, THE LETTERS AND THE LIFE OF FRANCIS BACON, London, Longmans, Green, Reader & Dyer, 1874, Volume vii, page 242.
12. THE NEW YORK TIMES, February 9, 1958, Section 4, page 2-E.
13. THE NEW YORK TIMES, July 12, 1958, page 1.
14. Soby, James Thrall, GEORGES ROUAULT, New York, Museum of Modern Art, 1947, pages 17, 19.
15. *Id.* at page 17.
16. Adhémar, Jean, HONORE DAUMIER, Paris, Editions Pierre Tisné, 1954, page 33.
17. Porter, Harold F., Jr., *Behind the Satire: A Lawyer Looks at Daumier*, 44 A.B.A.J. 530. Mayor, A. Hyatt, *A Bequest of Prints by Callot and Daumier*, BULLETIN OF THE METROPOLITAN MUSEUM OF ART, summer, 1958, page 17.
18. Soby, *op. cit. supra*, page 28.
19. Lord Campbell, *op. cit. supra* in note 1, Volume i, page 294.
20. Spedding, *op. cit. supra*, Volume vii, page 266 (note 2).
21. Lord Campbell, *op. cit. supra* in note 1, Volume ii, page 171.
22. *Schware* v. *Board of Law Examiners of the State of New Mexico*, 353 U. S. 232, 247 (1957).
23. Pound, Roscoe, THE LAWYER FROM ANTIQUITY TO MODERN TIMES, St. Paul, West Publishing Co., 1953, page 5.

Books for Lawyers

THE HIGH COURT OF CHIVALRY. *By G. D. Squibb, Q. C. Oxford: The Clarendon Press. 1959. Pages xxvi, 301.*

Writing in the 1760's, Blackstone asserted that the Court of Chivalry "has fallen into contempt and disuse" (3 Bl. Comm. 105), and in Holdsworth's *History of English Law* (volume 1, page 580, 6th ed. 1938), the author (in the last edition published in his lifetime) spoke of "the downfall of the court". Yet in 1954, the Lord Chief Justice of England, Lord Goddard, sitting as the Lieutenant, Assessor and Surrogate of the Earl Marshal (the Duke of Norfolk), solemnly held that the High Court of Chivalry still existed, notwithstanding it had not sat since 1737, and rendered judgment, including damages, against a vaudeville theater that had copied in its seal the municipal arms of the city wherein it was located. *Manchester Corporation* v. *Manchester Palace of Varieties, Ltd.*, [1955] Probate 133.

Mr. Squibb tells the fascinating story of this little known tribunal, which was spared from the destructive reforms of the nineteenth century primarily because the Victorian reorganizers had forgotten about it. Accordingly, as the *Manchester* case demonstrates, the Court of Chivalry still has jurisdiction to redress the improper use of another's armorial bearings.

Much of the story, necessarily, is primarily of interest to students of heraldry. For the legal historian generally, Mr. Squibb's account, drawn from original and heretofore untapped manuscript sources in the College of Arms and elsewhere, is perhaps primarily important because it explodes the old tradition that the Court of the Constable and the Marshal was the forerunner of the modern court martial. He makes it perfectly plain that the older view was in error, and that there was a sharp distinction between military jurisdiction and heraldic jurisdiction.

Maitland with his customary discernment had early pointed out the difference (*Const. Hist. of Eng.*, page 266): "Now as a matter of etymology, *marshall* has nothing whatsoever to do with *martial*—the marshall is the master of the horse—he is *marescallus, mareschalk*, a stable servant—while of course martial has to do with Mars, the god of war." The court's name was rendered in Latin as *Curia Militaris*, but Mr. Squibb points out that to rely on that title to call it the "court military" involves a mistranslation. In English medieval Latin, *miles* meant not "soldier", but "knight", so that, properly translated, it was the Court of Knighthood.

The distinction between the two jurisdictions is further emphasized by the events of the Civil War. The Petition of Right, with its condemnation of commissions of martial law, had nothing to do with the Court of Chivalry. Indeed, the Commonwealth Parliament created a parliamentary heraldic tribunal, "to prevent abuses in Heraldry". Accordingly, as the book under review points out, Holdsworth's account of the Court of Constable and Marshal needs to be drastically revised, because the late Vinerian professor continued to repeat the old misconceptions, failing to make the distinctions just noted, and because—speak it softly—he badly misread a number of significant post-Restoration decisions that dealt with the jurisdiction of the Court of Chivalry.

It follows that a thorough reexamination of the origins of military law, based on the earliest manuscripts, is in order and, indeed, long overdue. Meanwhile we have been given a fascinating recreation of an institution, based on rigorous and thorough research, and written with great charm.

One omission should be noted: Mr. Squibb nowhere reveals the fact that he was winning counsel in the *Manchester* litigation.

FREDERICK BERNAYS WIENER
Washington, D. C.

ECONOMIC PLAN AND ACTION: *Recent American Developments. By Charlton Ogburn. New York: Harper & Brothers. 1959. $4.75. Pages 287.*

The author is not only a Shakespearean scholar (March, 1959, A.B.A.J. 237) but has had long schooling which admirably prepares him to write books on economic planning. He was counsel of the National Planning Association for fifteen years and has been a member of its Board of Trustees since 1948. He has written a number of books on economic and governmental subjects.

In this book he frequently draws upon the reports prepared by the National Planning Association. This Association is characterized as an "independent group of distinguished representatives of business, agriculture, and labor. . ." It undertook a series of studies of various aspects of the American economy beginning in 1946. The author draws upon these reports to show how we have dealt with the export of capital, the disposition of farm commodities surpluses, the operation of a growing federal budget, the uses of nuclear energy, collective bargaining, foreign economic policy, and the demands of national defense.

He has a chapter on the Full Employment Act; three on the Export of United States Capital; one on Farm Commodities Surplus; one on the Federal Budget; two on United States Business Performance Abroad; and chapters on Organized Labor, Collective Bargaining, The Changing Economy of the American People, Productive Uses of Nuclear Energy, Foreign Economic Policy, Dispersal of Industry, Education for Economic Development, The Common Defense, and Social Effects of Economic Development.

There is far too much material in this book to be summarized in a review. Of particular interest to this

reviewer is the chapter on the changing economy. Mr. Ogburn states: "The new economy differs as widely from the capitalism of the nineteenth century as a new airplane does from a pre-war model". He describes this change as a compromise between, or combination of Jefferson's ultimate values of society, which he believed to be life, liberty, and the pursuit of happiness, and Hamilton's vision of America's national greatness, made possible by the power and wealth of an expanding industrial system and a growing population. The author describes our resulting economy as neither capitalism nor socialism, and points to the error made by followers of Marx and the Soviet Union in thinking that by this time the American capitalism would have collapsed. He points to the increasing gross national product and private incomes and credits this increased growth largely to scientific research and technological advance, much of which has been promoted with government aid.

Another interesting suggestion is as to the federal budget. This is a subject which has been studied by many groups. The suggestion is made that there should be two federal budgets: the conventional budget which can be compared to the future operating statement of a private corporation; the other would be comparable to a statement of assets and liabilities of a corporation. For example, as he points out, if Congress authorizes the Executive to erect a power plant for TVA at a cost of $100 million, and appropriates the money, this procedure should not be entered in its entirety in the cash budget. The Government would be authorized to give a contract to private construction firms to erect the power plant and would undertake to purchase the power for a period of years and pay for it during this period with a sufficient amount to reimburse the private firms for their outlay with reasonable interest and profit. In this manner, the expenditures entered in the budget would be the sums paid annually. A number of other interesting illustrations are given, all of which are well worth reading.

If the reviewer has any doubts, and he would be the first to disclaim any right to be at all critical, it is that there seems to be a belief that our economy can continue to expand and that we can avoid collapse by appropriate government actions. If inflation is given due weight, how much better off are we? What can we do about our increasing national, state, municipal and private debts?

There is much valuable material contained in this very readable book which could be read with profit by all lawyers and laymen who are interested in economic planning.

BENJAMIN WHAM

Chicago, Illinois

LAW IN DIPLOMACY. *By Percy E. Corbett. Princeton, New Jersey: Princeton University Press. 1959. $6.00. Pages 290.*

"Law thus fares rather badly in diplomacy"[1] is the challenging conclusion of Percy E. Corbett's *Law in Diplomacy*. In this period of renewed interest in the world-wide rule of law, lawyers will take sharp interest in Professor Corbett's excellent studies. If it is true, as Professor Corbett states, that international law yields to the needs of diplomacy and fails to control world events, a thorough analysis of the interaction between law and politics is indispensable to a proper understanding of the rule of law in the international community. *Law and Diplomacy* is among the first of the texts to pursue that end by examining the traditional fields of international law from the standpoint of law and politics.

This work is particularly interesting to American lawyers because geographical emphasis is placed upon the United Kingdom, the United States, and the Soviet Union. The challenge of the book is all the greater because it argues that the totalitarians are not the only states that use international law as an instrument of policy. Still more challenging is the fact that Professor Corbett's somewhat skeptical conclusions stem not from questions of pure logical analysis or doctrinaire notions of the *realpolitik* but rather from a view of the actual conduct of foreign relations by the principal powers of the modern world.

If Professor Corbett is properly concerned about the "mounting wave of criticism against the law of nations" (page viii), he proposes to "study and in some degree measure the influence of legal notions on foreign policy without assuming or elaborating a system of international law" (page vii). Questions of theory, doctrine, system and abstraction are minimized in order to search empirically for the operating functions of international law in practice.

During the ensuing search, Professor Corbett looks in at least briefly upon most of the traditional areas of world affairs which have been thought to be governed by the law of nations. Judged by the need to establish the rule of law as a means of controlling international transactions, the results are seldom appealing, as a glance at a few examples will show. The familiar rules of diplomatic immunity are found to arise from mutual fears of reprisal rather than a common recognition of the need to keep open the channels of diplomatic communication. If the British government occasionally accepted the opinions of its law officers regarding restraints upon English territorial jurisdiction, usually the legal position taken by British diplomats was dictated by political and economic goals. Ordinarily the favorable legal position was "available" to governments because of the inherently ambiguous and unsettled nature of international law. Several hundred years of history has not yet produced a solution to the resulting problems in the law of nations.

The British, says Professor Corbett, have not by any means enjoyed a monopoly upon the policy approach to international law. His survey of American diplomatic practice, if correct, is no more encouraging than his view of the British approach. Analyzing the use of rules concerning treaties, international law in national courts, and particularly the recognition practices of the United States, he finds that there is a vast difference "between systems of international law based upon what governments ask other governments to do and any system that can be built out of what they do themselves" (page 74).

The advances of the rule of the law of nations in the West to control conduct have thus been modest, but throughout

1. Page 272.

British and American practice there does exist an aspiration for erecting an effective legal system. With the Soviets even that goal is lacking. Soviet international law practice and legal goals are at least equally dominated by policy, as evidenced by Vyshinski's famous dictum that "Law in general is nothing but an instrument of politics" (page 100). No one in the West really takes seriously the recent efforts of Soviet writers to soften the official theory which Vyshinski announced in 1948 in a speech delivered at the United Nations.

International institutions like the League of Nations and the United Nations, Professor Corbett reminds us, are also dominated by politics, not only in their daily functions, but also in their constitutional developments. World politics killed the League, and but for the decisive action of the United States in the Korean action, would have killed the U. N. as well. Notwithstanding that the American government, "... obeying what it regarded as the clear law of the Charter, assumed a leading role ..." (page 241) in the Suez intervention of the U. N., the most critical difficulty in world organization is deemed to be its inability to force compliance with international law.

Viewing the over-all problems of the law of nations, Professor Corbett perhaps accurately states that "In a congeries of sovereign States, all that can be achieved is at best a rough approximation to a legal order. The approximation proceeds by piecemeal accretions to the area of international regulation. The work of the jurist in such a context should not be limited to the formulation of law appropriate to a perfected community" (page 278).

The proper development of these "piecemeal accretions" assumes on the part of lawyers a realistic awareness of the actual effect and use of legal rules in world politics and the correct role of the lawyer in the conduct of foreign affairs. Since our knowledge in both respects is extremely scanty, Professor Corbett is especially to be commended for adopting an approach that should become widely accepted as a point of departure for further international law research.

RICHARD F. SCOTT
Los Angeles, California

FREEDOM OF CHOICE IN EDUCATION. *By Virgil C. Blum, S.J. New York: The Macmillan Company. 1958. $3.95. Pages xiii, 230.*

This little book is a tract for these tax-conscious and inflationary times; it is a brief for governmental assistance to parents or guardians whose children attend private and independent schools, with special emphasis on the denominational schools. Emphasizing that direct subsidies to independent schools and colleges, and in particular to church-related ones, would be subject to constitutional difficulties, the author offers two kinds of subsidies for consideration which he states would not be constitutionally objectionable. The first of these is the tax credit plan. The tax credit plan most frequently mentioned provides that an amount equal to 30 per cent of the tuition and fees actually paid by the taxpayer to the institutions above the high school level attended by the taxpayer's child will be credited on the income taxes otherwise payable by the taxpayer. Thus if a man pays $1,000 annual tuition to a law school for his son's attendance, a $300 tax credit would be available to him. This plan has a particular appeal to those parents faced with long and expensive professional education for their children. It would be available to the taxpayer not only where the tuition is paid to a state university, but to a denominational school as well. It is believed that the tax credit plan is not subject to constitutional objection.

The tax credit plan has received the blessing of the taxation section of the American Bar Association and has been embodied in numerous bills in Congress during the last five years. Although great support has been given to it, the plan has not been adopted by Congress.

Even with present high tuition rates, a taxpayer's credit would hardly be more than a few hundred dollars. The cost of such a subsidy would be borne by the Federal Government, and by the state, on the income taxes paid by the taxpayers.

The author's second form of educational subsidy which he calls the certificate plan, provides that the government shall make direct money grants in the form of vouchers or certificates to parents or guardians of all children attending approved independent schools or out-of-state schools whether public or private. "The vouchers or certificates would be valid when used in partial payment of tuition and signed by a parent or guardian and school principal" (page 26). Schools in this sense would include every school, whether grade school, high school, college or professional schools. Literally millions of school children would be involved. The amounts reimbursable by the government to the parent would be of value to him dependent upon the size of his taxable income; the higher the tax bracket, the greater the benefit.

Although the author contemplates that these grants would be made by both state and Federal Government, it seems likely that the financial burden would be so heavy that only the Federal Government could bear it. Moreover, while the author does not mention this, the certificate plan could well be an answer to the segregationists' prayer. Independent schools where segregation is practiced could thus be supported by the aid given to the parent who sends his child to them.

It is the author's thesis, and this accounts for the title of the book, that there is no freedom of choice in education where there is government support for the public schools only and not for private or denominational ones. The theme is constantly repeated.

> The denial of educational benefits to children and youths whose parents wish to send them to independent schools is economic coercion to conformity that deprives both parents and children of basic constitutional liberties. It penalizes parents and children because of their exercise of rights guaranteed by the First Amendment [page 46].
>
> * * *
>
> The denial of educational benefits to independent-school children is doing the very thing that the First Amendment forbids. It prohibits the free

exercise of religion [page 47].

* * *

... Public health services are denied to children in nearly every state because of what they think or believe. Moreover, state subsidies for hot lunches are denied to children because of what they think or believe. And finally, tax-provided secular books are denied to children in nearly every state because of their exercise of the constitutional rights of freedom of mind or freedom of religion in the choice of schools.

These classifications do not constitute equal protection of the laws; they constitute arbitrary discriminations based on the student's thoughts and belief. This is in violation of the Fourteenth Amendment guarantee of equality [page 115].

These excerpts illustrate the trend of the author's thought and argument. Quite forcibly the book calls attention to the plight of the independent schools and to the fact that they face greater and greater difficulties in attracting private support as inflation and taxes increase. The operations of the state-supported schools seem quite lavish to those who must depend upon private charity and support for their very existence. There is certainly more of stucco and less of stone in the independent schools.

The limitation of the certificate plan to aid only parents whose children go to private or denominational schools or to out-of-state schools raises the question as to whether this thinly disguised subsidy will break down the wall of separation between church and state. Will the Supreme Court permit to be done in this indirect manner what it otherwise would not if the subsidy were direct?

The certificate plan if adopted would mean that the weak as well as the strong independent school would survive. Some may question whether the weak should survive. The reviewer questions whether, if the certificate plan is adopted, the Government will keep hands off as to what subjects may be taught and how education should be handled in the schools of this country. The author's belief that since the Government has not interfered, it is not likely to do so, is far from convincing. We do have the loyalty oath for the government scholarships.

The author complains that the gifts made by foundations go in overwhelming amounts to the better supported schools, whether public or private. Also noted is the large amount of government contracts which go to public as well as private universities for execution. The great foundations have not attempted to support private or denominational colleges based on the need of the college alone, nor has the Government granted contracts and appropriations for work which it requires to be done except to those institutions which it believes are strong enough to perform the work satisfactorily.

The strong call for government subsidies for private education in the indirect forms of the certificate plan brings to mind that greater efforts can and should be made by the constituents of private education for its support. Is public as well as private education doing the most efficient job? The studies of Ruml and Morrison suggest that nearly every school needs a careful self-examination, so as to get many more educational benefits for the same number of dollars.

(Ruml and Morrison, *Memo to a College Trustee, A Report on Financial and Structural Problems of the Liberal College*, McGraw-Hill Book Company, Inc., New York, 1959.)

HOMER D. CROTTY
Los Angeles, California

THE AMERICAN CONSTITUTION. *By C. Herman Pritchett. New York: McGraw-Hill Book Company, Inc. $7.95. 1959. Pages 719.*

In the fable of the blind men and the elephant, each man came to a very different conclusion as to the nature of the beast. Yet there was an element of truth in each man's view.

There is some truth too in the view of each of the divergent groups who hail our American Constitution as the basis for their varying philosophies—be they liberals or reactionaries, believers or atheists, free enterprisers or advocates of a planned economy.

In this excellent, and very readable work, Dr. Pritchett presents our American Constitution in all its aspects and without discernable bias.

The book is intended to be used as a text for students of political science. It commendably departs from the usual approach in such texts by giving major emphasis, after a short history of the document itself, to the development of constitutional law through the interpretative decisions of the U. S. Supreme Court. This development illustrates with striking clarity the American experimentalism which Father Bruckberger has contrasted with European dogmatism in his recent work *The Image of America.*

The author is chairman of the Department of Political Science at the University of Chicago. He is the author of numerous other books and articles in the fields of constitutional law, administrative law, and public administration. He has also served in the past in two U. S. Government agencies—The Tennessee Valley Authority and the U. S. Department of Labor, and is a former member of the editorial board of the *American Political Science Review.* He was a member of the Regulatory Agencies Task Force of the first Hoover Commission in 1948.

To many of us as attorneys, the special glory of the Constitution lies in the protection it has afforded through the years to individuals whose particular economic, religious or political activities have not met with the approval of the majority of Americans. Though no doubt not intended by the author, this study served to highlight for this reader one serious weakness in the Constitution in this respect, as it has been developed through Supreme Court decisions. This is the matter of limits under the Constitution upon the executive department in matters relating to national defense. On the one hand we have decisions which seem to unduly handicap the executive department in adequately serving the necessities of national defense particularly with respect to security matters. On the other hand we have other precedents established which allow the executive department to trample on the rights of unpopular minorities in most un-American fashion where the only justification lies in the presumed needs of national defense. The imprisonment in camps during the Second World War of Ameri-

can citizens who happened to be of Japanese ancestry is probably the most striking example of the failure of the Constitution to protect an unpopular minority. The forceable seizure of Americans of Japanese descent and their internment in remote areas of the West is only too reminiscent of Hitler's treatment of German citizens of Jewish ancestry and Soviet treatment of Hungarians and other minorities in the Soviet empire.

Though constitutional law is of secondary importance to the average practicing attorney, an enlightened understanding of it is vital to the future of America. The usual law school case method study of constitutional law does not give the law student adequate background in the subject, considering the influential role he will play in society as a practitioner after completion of his studies. To make this work by Dr. Pritchett required reading for students preparatory to taking a law school course in constitutional law would be a helpful step in broadening and deepening that background.

THOMAS MORAN
San Diego, California

THE FIRST BOOK OF THE CONSTITUTION. *By Richard B. Morris. New York: Franklin Watts. 1959. $1.95. Pages 68.*

THE FIRST BOOK OF THE SUPREME COURT. *By Harold Coy. New York: Franklin Watts. 1958. $1.95. Pages 57.*

Richard B. Morris, Professor of History at Columbia University Graduate School, is one of America's leading authorities on American history. His small book on the Constitution is another in the "First Book" series, setting forth the important facts of American history for young people.

In this book, Professor Morris traces the story familiar to lawyers of the history of the Articles of Confederation, the Constitutional Convention, our Bill of Rights, and then explains in simple terms the workings of the three departments of our Federal Government.

This book is written for children. It is accurate and attractive to young people. The language is simple and yet pleasing and thoroughly understandable to children of grade-school level. The illustrations by Leonard E. Fisher enhance the appeal of the book. The outline of the Constitution, which appears at the end of the book, is a valuable addition to it. Lawyers and judges will find this book an attractive gift for their children and for young future lawyers.

In his book on the Supreme Court, Mr. Coy, a free-lance newspaper reporter and news writer, has done a creditable job in setting forth the organization and workings of our Supreme Court.

His book, too, is directed toward young people. It tells them in simple, yet interesting language, what the Supreme Court is, how it works, how the Justices are appointed and how cases are decided. The book includes an appendix of legal terms, as well as a list of the Supreme Court Justices up to and including Mr. Justice Whittaker.

The book is enlivened with stories which tend to lighten the seriousness of it. As a good newspaperman, Mr. Coy knows the value of an appropriate story in the right place. The book is also illustrated by Helen Borten, which adds attractiveness and value to this small book.

These two books provide an interesting introduction to our Constitution and our Supreme Court for young people of grade school level.

EUGENE C. GERHART
Binghamton, New York

THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE. *By Carl Joachim Friedrich. Chicago: The University of Chicago Press. 1958. $4.75. Pages 253.*

This book is an enlarged version of an original German article in the *Enzyklopädie der Rechts und Staatswissenschaft.* It is comparable in its succinct coverage of the philosophy of law from the heritage of the Old Testament to the relativists, formalists and skeptics of today, to the famous, brief, comprehensive survey of ethical theory which Henry Sidgwick contributed to the *Encyclopaedia Britannica,* a work which likewise merited separate printing. The exposition is clear, the scholarly approach of Friedrich impressive and there is an amazing mass of material in brief compass. The controversial areas in the interpretations of the various philosophers reviewed are indicated and the author unhesitatingly sets forth his own conclusions based upon a survey of the leading authorities.

The critical searchlight which Friedrich plays upon the works of each legal philosopher is charged with "the basic hypothesis that without a comprehensive grasp of the problems of all experience law can be presented only in an artificial and contradictory way. Only by taking account of all the different kinds of experience can we give an image of the law adequate to reality and at the same time general. Only thus can a comprehensive philosophy of law be developed."

Plato, Aristotle, the Stoics, St. Augustine, Aquinas, the Humanists, Bodin, Althusius, Grotius and many another are reviewed from the earlier centuries until we get to the great drama of common law against natural law exemplified by James I, Edward Coke and Francis Bacon. From that period we go to Hobbes, the Utilitarians, Locke, Montesquieu, Spinoza, Rousseau, Kant, Hegel and then to contemporaries, Ihering, Stammler, Radbruch, Kelsen, the American Realists and finally to the revival of natural law in Europe and America.

Following this exposition, is an account of Friedrich's own philosophy of law in a second part entitled "Systematic Analysis". He stresses the common man as distinguished from the mass man. He believes the former is not some hypothetical average man but "is every man insofar as he participates as a free citizen in the decisions about common concerns" and as such his decisions are more probably correct and reliable than "those of an élite which is not made responsible to these common men".

In furtherance of his studies of the subject of authority in *Nomos, Volume I* of the American Society of Political and Legal Philosophy, he points out that while a Hitler might have had the

legal power, he did not have right and justice based on the authority of those who participate in the community's common concerns.

Legality he finds to be a question of positive law, legitimacy a matter of right and justice and authority a question of reasonableness. "In reality, the role of law in the totalitarian society is completely changed. Law here becomes a mere tool in the hands of the political leadership because justice as an autonomous value has disappeared."

He carries this analysis into the international sphere in the spirit of the Kantian view he has ably presented elsewhere. For the creation of an eventual world law, he hopes that the kind of philosophy of law he advocates will be adopted. "For according to it, just law is a system of reasonable rules which are grounded in the common experience of man, which seek to realize justice, which are created with the participation of all the members of the legal community on the basis of a constitution, and which rest upon the continuous effort of these members."

LESTER E. DENONN
New York, New York

MEET THE JUDGE! *By Ora Peaker. Boston: Meador Publishing Company. 1958. $3.50. Pages 304.*

This is a heartwarming biography of one of the most colorful and best-loved members of the Arkansas Bar, written from a secretary's-eye view. The subject is the late Edward B. Downie, of Little Rock, affectionately known to his friends and to the Bar generally as "the Judge". He bore that title for life, although his judicial service consisted only of seventeen days in 1917 as an interim appointee trial judge. It is a three-dimensional portrait of an unforgettable character, a rollicking summation of a man who left a firm imprint upon his community and the hearts of his friends.

The tenth of eleven children, Ed Downie was born on a farm in Osage County, Kansas, where he spent his boyhood. A turn of fate brought him to Arkansas when he was nineteen, six years after a crippling attack of polio had almost cost him his life. He received his law degree from the University of Arkansas in 1907 and within ten years had established himself as one of the state's leading lawyers. For more than twenty-five years he was general attorney for the Arkansas area of Southwestern Bell Telephone Company and for twenty-three of those years the author served as his secretary.

Life as the Judge's secretary became almost a game of chess, in which the traditional gambits were duly observed with great respect and friendship. The ever present and not always gentle wit of the Judge made each new case and each new encounter a pleasant chapter in a rich career as a legal secretary, whose boss gave her many turbulent moments but never any dull ones. Her days "were filled with surprises and contradictions, some of which would have tried the patience of Job, but they were never boring".

"Nature did not cast Ed Downie in the common mold", writes the author in her foreword. "She touched him with the fire of genius, imbued him with the agelessness of Peter Pan, and breathed into him the spirit of Puck. Then, reaching deep into her treasure chest, she endowed him with the magic gifts of kindness and understanding. Somewhere along the assembly line, a rare intellect, a fine philosophy, an explosive temper, and a quick wit were fused into his being. The result of the blending of these qualities was a striking and vivid personality—a man of warm, unaffected friendliness and sudden caprices, combining a charming mixture of wisdom and naivete, and a natural gentleness generously punctuated with violent outbursts and seasoned with rapier-like shafts."

While the book is not designed to give a definitive picture of the Judge's law practice or his professional accomplishments, several of the early chapters are devoted to Downie's law school days, his approach to the law, and incidents connected with his legal career. Instead, it portrays the human side of a man who distinguished himself not only in his chosen profession but in the minds and hearts of all those whose lives he touched.

The book is slanted for general reading, and those who never heard of the Judge prior to picking it up close it with a feeling that he is an old friend, to whom they will return again and again. It is a book of reminiscences told from close at hand, with warmth, humor and an occasional poignant note that tugs at the heartstrings. Here is found the boy who took pleasure in the April Fool practical joke, the Scrooge who delighted in Christmas, the learned attorney who quoted poetry to the elevator girls, the hunter who couldn't fire a shot, and the fisherman who told tall tales.

Many of the chapters will hold especial interest for lawyers, including an appropriately titled chapter which entertainingly tells the story of the origin of the familiar expression, "The Law is a jealous mistress."

EDWARD L. WRIGHT
Little Rock, Arkansas

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Commerce . . . *safety measures*

Bibb v. *Navajo Freight Lines, Inc.*, 359 U. S. 520, 3 L. ed. 2d 1003, 79 S. Ct. 962, 27 U. S. Law Week 4337. (No. 94, decided May 25, 1959.) *On appeal from the United States District Court for the Southern District of Illinois. Affirmed.*

This decision held that an Illinois statute requiring the use of a certain type of mudguard on the rear fenders of trucks and trailers operated on its highways was an undue burden upon interstate commerce.

The appellees were interstate motor carriers who brought suit in a three-judge District Court to challenge the constitutionality of the Illinois statute that required the use of the mudguards. The statute made the conventional mudguard, legal in forty-five states, illegal in Illinois and, when considered with a rule of the Arkansas Commerce Commission requiring a different type of mudguard, made it impossible to use the same vehicle in both states. The District Court held the statute unconstitutional and enjoined the appellants from enforcing it.

Mr. Justice DOUGLAS delivered the opinion of the Supreme Court. Illinois contended that its statute was a safety regulation and that the kind of mudguards it required prevented the throwing of debris into the faces of drivers of passing cars and onto the windshields of a following vehicle. The Court conceded that the state had broad power to regulate the use of its highways and that safety measures required by the state were entitled to a strong presumption of validity. The Court nevertheless concluded that this was "one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce". The Court was especially impressed by the effect of the Illinois act upon the practice of "interlining"—*i.e.*, interchanging trailers between an originating carrier and another carrier. Interlining involves the physical transfer of the entire trailer; there is no unloading and reloading of cargo, the Court said. Carriers operating in and through Illinois cannot compel the originating carriers to equip their trailers with the Illinois-approved type of mudguard. Over 60 per cent of the business of five of the six plaintiffs was interlined traffic, the Court noted, and all of them operate in interstate commerce. The annual mileage in Illinois does not exceed 7 per cent for any one of them.

Mr. Justice HARLAN, joined by Mr. Justice STEWART, wrote a brief concurring opinion which emphasized a finding by the District Court that the Illinois mudguard "possesses no advantages" in terms of safety and indeed creates certain safety hazards.

The case was argued by William C. Wines for appellants and by David Axelrod for appellees.

Commerce . . . *unreasonable rates*

T.I.M.E. Incorporated v. *United States, Davidson Transfer & Storage Company, Inc.* v. *United States*, 359 U. S. 464, 3 L. ed. 2d 952, 79 S. Ct. 904, 27 U. S. Law Week 4317. (Nos. 68 and 96, decided May 18, 1959.) *No. 68 on writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed. No. 96 on writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed.*

These cases held that a shipper of goods by motor carrier could not challenge in post-shipment litigation the reasonableness of the carrier's I.C.C.-approved rates.

In each of the cases, the Government shipped goods by the respective petitioners, certificated motor carriers whose tariffs had been approved by the Interstate Commerce Commission. On postpayment audit, the General Accounting Office concluded that the rates charged were unreasonable and demanded refunds. Both carriers made the refunds under protest and then filed suit under the Tucker Act. The District Courts denied relief but were reversed by the Courts of Appeals which held that the Government was entitled to a determination of the "reasonableness" of the rates by the I.C.C.

Mr. Justice HARLAN spoke for the Supreme Court, which reversed the Courts of Appeals. The Court rested its decision upon a holding that Part II of the Interstate Commerce Act (the Motor Carrier Act) did not give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates. The Court pointed out that Parts I and III of the Interstate Commerce Act do give a right of action against carriers for damages incurred as a result of carrier violations of the act, but there is no comparable provision in the Motor Carrier Act. To allow such a right of reparation "would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I", said the Court.

The Government had also argued that the Motor Carrier Act should at least be read as preserving a pre-existing common law right to recover the portion of the rates that exceeded reasonableness. It based this argument on Section 216(j), which provides that nothing in Section 216 "shall be held to extinguish any remedy or right of action not inconsistent herewith". To this the Court replied that, under the statutory scheme, only the I.C.C. could

Reviews in this issue by Rowland Young.

decide in the first instance whether any rate was "unreasonable" and this necessarily extinguished any "common law" remedy, which would be incompatible with the Commission's primary jurisdiction.

Mr. Justice BLACK wrote a dissenting opinion in which the CHIEF JUSTICE, Mr. Justice DOUGLAS and Mr. Justice CLARK joined. The dissent disagreed with the interpretation given by the Court to the cases on which it relied in arriving at its decision, saying that one of these cases "has virtually nothing to do with the issue" and that the other "supports a holding opposite to that which the Court makes today". The dissent argued that there was nothing in the act or its legislative history that showed any congressional intention to take away the pre-existing common law remedy, and that the I.C.C. has consistently interpreted the statute as leaving shippers the right to sue in the courts for damages resulting from unlawful rates.

The cases were argued by W. D. Benson, Jr., and Bryce Rea, Jr., for petitioners and by Morton Hollander for the United States.

Constitutional law . . . *literacy test for voters*

Lassiter v. *Northampton County Board of Elections*, 360 U. S. 45, 3 L. ed. 2d 1072, 79 S. Ct. 985, 27 U. S. Law Week 4405. (No. 584, decided June 8, 1959.) *On appeal from the Supreme Court of North Carolina. Affirmed.*

In this case, the appellant, a Negro citizen of North Carolina, failed in her attempt to have declared invalid North Carolina's requirement of a literacy test for voters.

The appellant brought suit in a three-judge Federal District Court to have the literacy test declared null and void. That court noted that the literacy-test provision contained a grandfather clause which was clearly a violation of the Federal Constitution but that the North Carolina statute that enforced registration requirements for voters contained no such clause. Being uncertain of the significance of the statute, the District Court stayed its action and retained jurisdiction of the case to allow the appellant reasonable time to exhaust her administrative remedies and obtain an interpretation of the statute from the state courts.

The appellant then applied for registration as a voter. Her registration was denied because she refused to take the literacy test. She appealed to the Board of Elections, then to the Superior Court and finally to the North Carolina Supreme Court, failing each time. In sustaining the validity of the literacy test, the state supreme court held that the grandfather clause, which was conceded to be invalid by the state attorney general, had been eliminated from the state law.

Mr. Justice DOUGLAS affirmed for a unanimous Supreme Court. The appellant had argued that the cut-off date in the grandfather clause was December 1, 1908, and that, under the state's permanent registration law, those who were registered before then might still be voting. If they were allowed to vote without taking a literacy test and she was denied the right to vote without passing the test, there would still be a violation of the Fifteenth Amendment, the argument went. The Court replied that this issue of discrimination "in the actual operation of the ballot laws" had not been framed in the issues presented for the state court litigation and so the Court did not reach it.

In holding that states could constitutionally impose literacy tests on "all voters irrespective of race or color", the Court pointed out that there is a wide scope for the exercise of the state's jurisdiction to determine the qualification of voters. "The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot", the Court said. "Literacy and illiteracy are neutral on race, creed, color, and sex. . ." The Court added a warning that it would not sustain a literacy test that was in fact employed to perpetuate racial discrimination.

The case was argued by Samuel S. Mitchell for appellant and by I. Beverly Lake for appellee.

Courts . . . *federal injunctions*

Harrison v. *National Association for the Advancement of Colored People*, 360 U. S. 167, 3 L. ed. 2d 1152, 79 S. Ct. 1025, 27 U. S. Law Week 4384. (No. 127, decided June 8, 1959.) *On appeal from the United States District Court for the Eastern District of Virginia. Judgment vacated and cause remanded.*

This was an action against the Attorney General of Virginia and a number of other officials of that commonwealth for declaratory and injunctive relief with respect to the enforcement of five statutes passed by the Virginia legislature. The complaint alleged irreparable injury and sought a declaration that each statute infringed rights assured by the Fourteenth Amendment; an injunction was also sought against enforcement.

A three-judge Federal District Court held three of the statutes (Chapters 31, 32 and 35 of the Virginia Code) unconstitutional and permanently enjoined their enforcement against the appellees. It found the other two statutes (Chapters 33 and 36) vague and ambiguous and accordingly retained jurisdiction in order to give the parties time to obtain an interpretation of them from the state courts. The commonwealth appealed the ruling as to Chapters 31, 32 and 35; no appeal was taken as to the disposition of Chapters 33 and 36.

The Supreme Court, speaking through Mr. Justice HARLAN, vacated the judgment and remanded the cause, holding that the District Court should have disposed of Chapters 31, 32 and 35 in the same manner that it disposed of the other two. The Court discussed the effect of each of the three statutes (Chapter 31 proscribed the public solicitation of funds and the expenditure of funds for the prosecution of an "original proceeding" by persons that have no "pecuniary right or liability" in the proceeding without registering with the State Corporation Commission; Chapter 32 requires registration of persons who advocate "racial integration or segregation"; Chapter 35 is a barratry statute).

In holding that the Federal District Court should have allowed time for the testing of the effect of the statutes in the state courts, the Supreme Court

declared that this was a "well-established procedure . . . aimed at the avoidance of unnecessary interference by the federal courts with the proper and validly administered state concerns, a course so essential to the balanced working of our federal system". The Court explained that it could not agree that the terms of the three statutes left "no reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication".

Mr. Justice DOUGLAS, joined by the CHIEF JUSTICE and Mr. Justice BRENNAN, wrote a dissenting opinion which took the position that the Virginia statutes were enacted for the express purpose of impeding racial integration in the schools. The Civil Rights Act, the dissent declared, gave the appellees the right to bring this suit in the federal court and it was the duty of that court to provide the remedy. "We need not—we should not—give deference to a state policy that seeks to undermine paramount federal law", the dissent declared.

The case was argued by David J. Mays and J. Segar Gravatt for appellants and by Thurgood Marshall for appellees.

Courts . . . *jury trial*

Beacon Theatres, Inc. v. *Westover*, 359 U. S. 500, 3 L. ed. 2d 988, 79 S. Ct. 948, 27 U. S. Law Week 4340. (No. 45, decided May 25, 1959.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Reversed.*

The petitioner sought a writ of mandamus to require a federal district judge in the Southern District of California to vacate certain orders alleged to deprive it of a jury trial. The controversy was between the petitioner and Fox West Coast Theatres, Inc., over Fox's contracts with movie distributors for exclusive "first-run" rights in the San Bernardino area. The petitioner built a drive-in theatre near San Bernardino and then notified Fox that it considered the first-run contracts to be violations of the antitrust laws. Fox thereupon filed suit, alleging that Beacon's notification, together with threats of treble-damage suits, deprived it of a valuable property right—the right to negotiate for exclusive first-run pictures. Fox alleged that irreparable harm would result unless Beacon was restrained and prayed for a declaration that its contracts were reasonable and not a violation of the antitrust laws. It also asked for an injunction to prevent Beacon from instituting any antitrust action. Beacon cross-claimed, denying that there was any competition between the theatres, asserting that the contracts were unreasonable and that a conspiracy existed between Fox and its distributors to monopolize first-run pictures. Treble damages were asked. Beacon demanded a jury trial, but the District Court viewed Fox's contentions as essentially equitable, and directed that those issues be tried before the jury determination of the validity of Beacon's antitrust claim. Beacon then sought its writ of mandamus, which the Court of Appeals denied, ruling that the trial judge had acted within his proper discretion. The Court of Appeals reasoned that Fox was seeking an equitable remedy, and, since a court of equity could retain jurisdiction even though later a legal remedy became available, by analogy it was not an abuse of discretion for the trial judge to try the equitable cause first. Beacon argued that this might, by collateral estoppel prevent a full jury trial of its antitrust contentions.

The Supreme Court reversed, speaking through Mr. Justice BLACK. Assuming that Fox's complaint did allege the kind of harassment that traditionally would have justified equity jurisdiction, the Court said, the remedies now made available by the Declaratory Judgment Act and the Federal Rules make it impossible to justify depriving Beacon of its jury trial. "Since in the federal courts equity has always acted only when legal remedies were inadequate," the Court said, "the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity." The right to trial by jury is a constitutional one, the Court added, and a judge's discretion to grant equitable relief in cases where the availability of a declaratory judgment or joinder in one suit of legal and equitable causes would not be adequate is narrowly limited.

Mr. Justice STEWART, joined by Mr. Justice HARLAN and Mr. Justice WHITTAKER, wrote a dissenting opinion. The dissent argued that the postponement of the jury hearing was within the discretion of the trial judge and criticized the Court's opinion for implying that the Declaratory Judgment Act and the Federal Rules deprived a court of equity of power to act.

The case was argued by Jack Corinblit for petitioner and by Frank R. Johnston for respondents.

Criminal law . . . *informations*

Smith v. *United States*, 360 U. S. 1, 3 L. ed. 2d 1041, 79 S. Ct. 991, 27 U. S. Law Week 4415. (No. 90, decided June 8, 1959.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed and remanded.*

Petitioner and two seventeen-year-old boys escaped from a Florida jail, seized an automobile and its driver and forced him to accompany them to Alabama. They released the driver unharmed and later abandoned the vehicle. They were arrested by federal authorities and charged with transporting a kidnap victim across state lines. After his arrest, the petitioner was interviewed at length by a government agent. There was conflicting evidence as to whether or not petitioner was promised leniency at this interview if he pleaded guilty. Later the same agent held a private conference with the district judge to discuss the case. None of the defendants were present or represented. In the formal hearing which followed, the defendants agreed to waive indictment and stated that they were willing to be prosecuted under an information to be filed by the prosecutor. They also stated that they did not want counsel. The information was immediately filed, the defendants pleaded guilty and received sentences. The petitioner received thirty years, his accomplices fifteen each.

The case had a long history in the

Court of Appeals, finally resulting in a reversal and a remand to the District Court. On remand, the District Court resentenced the petitioner but refused him permission to withdraw his waivers and his plea of guilty.

The Court of Appeals affirmed this decision over a dissent.

Speaking for the Supreme Court, the CHIEF JUSTICE reversed and remanded. The Court's decision turned upon its interpretation of the validity of the use of an information rather than an indictment and so it did not reach the due process questions raised. The Court noted that Rule 7(a) of the Federal Rules of Criminal Procedure requires capital crimes to be prosecuted by indictment. Kidnapping and transporting across state borders is a capital crime if the victims are harmed but is punishable only by a term of years if the victims are released unharmed. The Government contended that this crime was not capital, since the victim was released unharmed. The Court held, however, that the statute creates a single offense, punishable by death if certain proof is introduced at the trial. Accordingly, the Court reasoned, this crime was capital and required prosecution by indictment, so that the United States Attorney did not have the authority to file an information. The Court reversed and remanded with instructions to dismiss the information.

Mr. Justice CLARK, joined by Mr. Justice HARLAN and Mr. Justice STEWART, wrote a separate opinion concurring in part and dissenting in part. The dissent felt that the statute in effect creates two crimes: one capital and one not capital. The contention was that the Court's method of disposing of the problem made it possible for the prosecutor to obtain an indictment for a capital crime without the grand jury's knowing that the crime was capital, since the grand jury would not consider whether the victim was released unharmed. The dissent also felt that the private conference between the judge and the government agent was prejudicial since the conference was conducted before the plea was entered, contrary to Rule 32(c)(1) of the Federal Rules of Criminal Procedure.

The case was argued by William B. Moore, Jr., for petitioner and by Leon Silverman for the United States.

Eminent domain . . . *diversity jurisdiction*

Allegheny County v. *Frank Mashuda Company*, 360 U. S. 185, 3 L. ed. 2d 1163, 79 S. Ct. 1060, 27 U. S. Law Week 4361. (No. 347, decided June 8, 1959.) *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Affirmed.*

Here the Court held that a Federal District Court erred when it abstained from exercising its properly invoked diversity jurisdiction in a state eminent domain case.

The Board of County Commissioners of Allegheny County, Pennsylvania, sought to appropriate certain real property owned by residents of Wisconsin for use in enlarging the Greater Pittsburgh Airport. They petitioned the state Court of Common Pleas for appointment of a Board of Viewers to assess damages for the taking. The Board of Viewers convened and awarded the respondents $52,644 compensation. Both parties appealed to the Court of Common Pleas and that appeal was still pending when the respondents, the owners of the land in question, brought this suit in the District Court alleging that their property had been leased to a corporation for its private business use. Under Pennsylvania law, private property cannot be taken for private use under the power of eminent domain. The respondents sought a judgment of ouster against the County and the lessee corporation and, in the alternative, an injunction restraining the County from further proceedings in the state court damage action. The District Court dismissed the suit on the ground that, while the diversity jurisdiction was properly invoked, a federal court "should not interfere with the administration of the affairs of a political subdivision acting under color of State law in a condemnation proceeding". The Court of Appeals reversed.

Mr. Justice BRENNAN spoke for the Supreme Court, which affirmed the judgment of the Court of Appeals. The Court said that a District Court may abstain from exercising jurisdiction over a case only under "an extraordinary and narrow exception" to its duty to adjudicate controversies properly before it. The Court could find no "exceptional circumstances" in this case to justify the District Court's dismissal. There was no issue of federal-state relations, the Court said, because the District Court would be applying state law, in effect as if it were a court of the state, and the Pennsylvania law on the seizure of property for private use was clear. Federal courts have been adjudicating cases involving issues of state eminent domain law for years, the Court went on, without any suggestion that this entails a hazard of friction between the Federal Government and the states.

Mr. Justice CLARK, joined by Mr. Justice BLACK, Mr. Justice FRANKFURTER and Mr. Justice HARLAN, wrote a dissenting opinion which saw nothing to indicate that the trial judge had abused his discretion in dismissing the case. In fact, the dissent argued, the result was a failure to apply "modern businesslike procedures in the administration of the federal diversity jurisdiction", since the County now has two lawsuits on its hands. If it prevails in the federal court, it must still go back to the state court to try the issue of damages. If it loses in the federal court, it must still go back to the state court and start all over again with a new action or amendment of the old one. The dissent also declared in a footnote that the grounds relied upon by the respondents for their suit in the federal court "are obviously frivolous".

The case was argued by Philip Baskin for petitioner and by Harold R. Schmidt for respondents.

Eminent domain . . . *diversity jurisdiction*

Louisiana Power & Light Company v. *City of Thibodaux*, 360 U. S. 25, 3 L. ed. 2d 1058, 79 S. Ct. 1070, 27 U. S. Law Week 4407. (No. 398, decided June 8, 1959.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed.*

This was another case in which the diversity jurisdiction of a federal court was invoked in a state eminent domain proceeding. In this case, however, the

Court upheld the federal judge's refusal to step in.

The City of Thibodaux, Louisiana, began eminent domain proceedings in a Louisiana court, asserting a taking of the property of the petitioner, a Florida corporation. The petitioner removed the case to the federal court on the basis of diversity of citizenship. After a pretrial conference, the judge, on his own motion, ordered further proceedings stayed pending an interpretation by the Louisiana Supreme Court of a state statute. The Court of Appeals reversed.

Speaking for the Supreme Court, Mr. Justice FRANKFURTER reversed and ordered reinstatement of the stay order of the District Court. The Court explained that the district judge was placed in a quandary by the situation presented. An opinion of the Louisiana Attorney General in a "strikingly similar" case had held the city did not have the power claimed by Thibodaux here. A Louisiana statute apparently grants such power, but the statute has never been interpreted although it has been on the books since 1911. In refusing to act until the statute was authoritatively construed, the Court declared, the "District Court was . . . exercising a fair and well-considered judicial discretion . . ."

Mr. Justice STEWART appended a brief concurring opinion calling attention to the difference between this case, where there was a controlling state statute "of highly doubtful meaning", and the *Mashuda* case, *supra.*

Mr. Justice BRENNAN wrote a dissenting opinion in which the CHIEF JUSTICE and Mr. Justice DOUGLAS joined. The opening paragraph of this opinion is taken almost verbatim from the Court's opinion in the *Mashuda* case. The dissent goes on to argue that there are two reasons for a federal court's abstention in such cases: avoidance of deciding a case on constitutional grounds when the state courts might decide it on other grounds, and avoidance of "needless friction with state policies". Neither of these reasons applied here, the dissent declared. The fact that a difficult question of state law was presented was no justification for the court's refusal to act, the dissent declared, since federal courts often decide doubtful questions of state law.

The case was argued by J. Raburn Monroe for petitioner and by Louis Fenner Claiborne for respondent.

Fair Trade . . . *services discrimination*

Federal Trade Commission v. *Simplicity Pattern Co., Inc., Simplicity Pattern Co., Inc.* v. *Federal Trade Commission,* 360 U. S. 55, 3 L. ed. 2d 1079, 79 S. Ct. 1005, 27 U. S. Law Week 4389. (Nos. 406 and 407, decided June 8, 1959.) *On writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed in part and affirmed in part.*

This decision held that neither the absence of competitive injury nor the presence of "cost justification" constituted a defense to a charge of violation of Section 2(e) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526.

The Simplicity Pattern Co., Inc. is the nation's largest dress pattern manufacturer, selling tissue patterns that are used in the home for making women's and children's wearing apparel. It sells patterns to some 12,300 retailers, with 17,200 outlets. These retailers fall into two classes: one, consisting of department and variety stores, comprises only 18 per cent of Simplicity's customers, but accounts for 70 per cent of the total sales volume. The other 82 per cent of the customers are small stores whose primary business is selling fabrics. The latter handle patterns as an accommodation to their fabric customers, even selling them at a loss.

The variety stores sell patterns for a profit. Simplicity charges a uniform price to all—60 per cent of the retail price of the pattern. However, it furnishes patterns to variety stores on consignment, requiring them to pay only when the patterns are sold. The fabric stores are required to pay cash for their patterns. Furthermore, Simplicity furnishes free of charge cabinets and catalogues to the variety stores while it charges the fabric stores therefor, and it pays all transportation costs of its business with the variety stores, but not with the fabric stores.

The F.T.C. issued a cease-and-desist order directed against Simplicity's discrimination in favor of the variety stores. The Court of Appeals affirmed the Commission's finding that competition existed between the variety stores and the fabric stores and agreed that the absence of competitive injury would not constitute "justification", but it held that Simplicity might rebut the prima facie case by showing that the discriminations in services were justified by differences in its costs in dealing with the two classes of customer.

Speaking through Mr. Justice CLARK, a unanimous Supreme Court upheld the Commission on both points. Simplicity had argued that "motivation" controlled competition, and that competition between the variety stores and the fabric stores was minuscule since the former sold for profit and the latter for accommodation. The Court replied that the existence of competition does not depend upon motives, adding that the fabric stores certainly had an incentive to sell the patterns they had on hand, especially when cash was tied up in keeping the patterns on the shelves. Moreover, the Court said, even if the sale of patterns was a minuscule part of the fabric stores' business and "the giving of discriminatory concessions to a variety store on any one isolated item might cause no injury to competition with a fabric store in its over-all operation, that fact does not render nonexistent the actual competition between them in patterns".

Simplicity had relied upon the language of Section 2(b) of the statute in contending that it could justify its discrimination by showing lower costs in connection with its transactions with the variety stores. Section 2(b) provides that the burden "of rebutting the prima-facie case [of price or services discrimination] thus made *by showing justification* shall be upon the person charged with a violation of this section. . ." The Court concluded, that the "justification" that could be shown was only justification expressly provided for in other sections of the act—for example, price discriminations that make allowances for differences in the cost of manufacture, sale or delivery

(permitted under Section 2(a)) or discriminations to meet competition (permissible under Section 2(b)).

The cases were argued by Charles H. Weston for the Federal Trade Commission and by William Simon for the Simplicity Pattern Co.

Government employees . . . *security discharges*

Vitarelli v. *Seaton*, 359 U. S. 535, 3 L. ed. 2d 1012, 79 S. Ct. 968, 27 U. S. Law Week 4347. (No. 101, decided June 1, 1959.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed.*

This decision held that the petitioner was illegally discharged as an employee of the Department of the Interior.

The petitioner was employed as an Education and Training Specialist in the Education Department of the Trust Territory of the Pacific Islands, a United States mandated area. In 1954, the Secretary of the Interior notified the petitioner of his suspension from duty without pay, assigning as grounds petitioner's "sympathetic association" with three persons alleged to be Communists, his registration as a supporter of the American Labor Party and his purchase of Communist publications. The notice concluded that petitioner's continued employment might be "contrary to the best interests of national security". Petitioner filed a written answer and later was given a hearing before a security hearing board. At this hearing, no evidence was adduced by the Department in support of its charges and no witnesses testified against the petitioner. Later a notice of dismissal was sent to the petitioner reciting that the dismissal was "in the interest of national security for the reasons specifically set forth in the letter of charges. . ." Petitioner then filed this suit in the District Court seeking a declaration that his dismissal was illegal and ineffective and an injunction requiring his reinstatement. While this case was pending, a new notice was sent to the petitioner in 1956 which stated that it was a "revision of and replaces" the original. This notice was identical except that it omitted any reference to the reason for the discharge. The District Court granted summary judgment for the respondent and the Court of Appeals affirmed. The petitioner was not under the protection of the Civil Service Act or the Veteran's Preference Act and concededly could have been discharged summarily at any time without a reason.

Speaking through Mr. Justice HARLAN, the Supreme Court reversed on the ground that, since the Secretary gratuitously decided to give a reason for the discharge, and that reason was national security, he was obligated to conform to all the procedural standards that he had set up for the dismissal of employees on those grounds. Since the procedure followed in discharging the petitioner did not meet these standards, the Court held that it was invalid. The Court refused to consider the 1956 notice of dismissal as anything but a revision of the original notice, rejecting the respondent's contention that it was an effective dismissal at least as of 1956.

Mr. Justice FRANKFURTER, joined by Mr. Justice CLARK, Mr. Justice WHITTAKER and Mr. Justice STEWART, wrote an opinion concurring as to the necessity for the respondent's following the procedural standards set up for the dismissal of employees for security reasons, but dissenting as to the invalidity of the 1956 dismissal. Since the respondent could summarily dismiss the petitioner, the opinion argued, the 1956 notice was certainly effective to discharge him as of then even though the attempt to make the dismissal retroactive was invalid.

The case was argued by Clifford J. Hynning for petitioner and by John G. Laughlin, Jr., for respondents.

Insurance . . . *double indemnity*

Dick v. *New York Life Insurance Co.*, 359 U. S. 437, 3 L. ed. 2d 935, 79 S. Ct. 921, 27 U. S. Law Week 4326. (No. 58, decided May 18, 1959.) *On writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Reversed.*

This decision held that it was error for the Court of Appeals to reverse a District Court's submission to the jury of the question whether an insured died as a result of suicide or accident.

The facts behind the litigation read like the scenario for a television program. The petitioner was the beneficiary of two policies insuring the life of her husband. Each policy contained a double indemnity provision in case of accidental death; the double indemnity naturally was not payable in the event of suicide. The insured was found dead in the silage shed of his North Dakota farm, two wounds having been inflicted by the discharge of the shotgun he kept in the shed to fight vicious dogs that had made attacks on his sheep. There was evidence to indicate that the first wound, on the chest, would not have been immediately fatal nor would it have prevented the deceased from discharging the gun a second time if he committed suicide. There was also evidence to show that the decedent was in good health, apparently cheerful, well liked in the community and had no financial problems. He was an experienced hunter and had reported that his shotgun did occasionally discharge accidently.

The insurance company refused to pay the double indemnity on the ground that the decedent had committed suicide. The petitioner filed suit in the state courts, but respondent removed it to the Federal District Court on the ground of diversity of citizenship. The trial judge allowed the case to go to the jury which returned a verdict for $7,500. The trial judge had charged the jury that under state law, accidental death was presumed and the respondent had the burden of showing suicide.

The Court of Appeals reviewed the evidence and reversed, primarily because it found it impossible to believe that an experienced hunter would accidentally shoot himself twice.

The Supreme Court reversed this holding, speaking through the CHIEF JUSTICE. The Court said that the evidence could support a finding by the jury that the gun might have fired accidentally. The Court pointed out that the evidence was consistent with a theory of accidental death and that the burden of proof was upon the respondent to prove suicide.

Mr. Justice STEWART noted that he concurred in the judgment.

Mr. Justice HARLAN took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER, joined by Mr. Justice WHITTAKER, wrote a dissenting opinion in which he again objected to granting certiorari to cases of this nature. The only question presented the dissent argued, was one of weighing evidence. "To undertake an independent review of the review by the Court of Appeals of evidence is neither our function nor within our special aptitude through constant practice" the dissent urged.

The case was argued by Philip B. Vogel for petitioner and by Norman G. Tenneson for respondent.

Labor law . . . *what is a "labor organization"?*

National Labor Relations Board v. *Cabot Carbon Company*, 360 U. S. 203, 3 L. ed. 2d 1175, 79 S. Ct. 1015, 27 U. S. Law Week 4357. (No. 329, decided June 8, 1959.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed and remanded.*

The question decided here was whether "Employee Committees" established and supported by the respondents at their plants were "labor organizations" within the meaning of Section 2(5) of the National Labor Relations Act. The Court held that they were.

Respondents operate a number of plants in Texas and Louisiana for the purpose of manufacturing and selling carbon black and oil field equipment. In 1954, the International Chemical Workers Union, AFL-CIO, filed with the Labor Board a charge of unfair labor practices against the respondents, alleging that they were dominating and interfering with and supporting labor organizations called "Employee Committees" at their plants. The Board found that the committees were labor organizations and entered an order to respondents to withdraw all recognition from the Committees and to disestablish them. The Court of Appeals denied enforcement of the order on the ground that the Committees were not "labor organizations".

Mr. Justice WHITTAKER spoke for a unanimous Supreme Court, reversing and remanding.

The Committees were set up in 1943, pursuant to a suggestion of the War Production Board. Their purpose, as stated in their bylaws, was to "provide a procedure for considering employees' ideas and problems of mutual interest to employees and management". The Committees met regularly with the plant management and handled grievances at nonunion plants. The Committees also made recommendations as to such matters as seniority, job classifications, job bidding, makeup time, overtime records, work schedules, holidays and vacations, sick leave, and improvement of working conditions.

The Court of Appeals had ruled that the committees were not "labor organizations" because Section 2(5) defines labor organization as any "employee representation committee or plan . . . which exists for the purpose, in whole or in part, of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work". The Court of Appeals reasoned that the words "dealing with" were synonymous with "bargaining with" and these committees avoided "bargaining" and merely advised the management.

In rejecting this interpretation, the Supreme Court relied upon the legislative history of the Wagner Act and the Taft-Hartley Act. Congress had expressly rejected a substitution of the words "bargaining collectively" for "dealing with" in the Wagner Act, the Court noted. The Court pointed out that the bylaws under which the committees were organized gave them the responsibility of handling grievances for nonunion members. This alone brought them within the statutory definition, the Court said.

The case was argued by Thomas J. McDermott for petitioner and by Haywood H. Hillyer, Jr., for respondents.

Maritime law . . . *Employee's Compensation Act*

Patterson v. *United States*, 359 U. S. 495, 3 L. ed. 2d 971, 79 S. Ct. 936, 27 U. S. Law Week 4334. (No. 429, decided May 18, 1959.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

Petitioners were injured in the course of their employment by the United States aboard vessels operated by the Government, engaged in merchant service. They filed libels *in personam* against the United States under the Suits in Admiralty Act. The Court of Appeals dismissed on the ground that their exclusive remedy was under the Federal Employees' Compensation Act.

The Supreme Court affirmed *per curiam*, declaring that the Compensation Act had been held to be the exclusive remedy in *Johansen* v. *United States*, 343 U. S. 427, a case similar except that the government vessels there were engaged in public service, not in merchant service. The Court expressly declined to overrule the *Johansen* case.

Mr. Justice BLACK and Mr. Justice DOUGLAS dissented without opinion.

The case was argued by Jacob Rassner for petitioners and by Leavenworth Colby for the United States.

Supreme Court . . . *applications for review*

Ohio ex rel. *Eaton* v. *Price*, 360 U. S. 246, 3 L. ed. 2d 1200, 79 S. Ct. 978. (No. 699, decided June 8, 1959.) *Appeal from the Supreme Court of Ohio. Probable jurisdiction noted.*

This case presented the unusual situation of a notation of probable jurisdiction to which three separate memoranda were attached.

Mr. Justice FRANKFURTER, Mr. Justice CLARK, Mr. Justice HARLAN and Mr. Justice WHITTAKER, who voted against noting probable jurisdiction, filed a separate memorandum noting that they were of the opinion that the case was controlled by, and should be affirmed on the authority of, *Frank* v. *Maryland*, 359 U. S. 360, decided May 4. [The *Frank* case held that a search of a private home without a search warrant by a health inspector was not an invasion of constitutional rights. See 45 A.B.A.J. 845, August, 1959.]

Mr. Justice BRENNAN'S memorandum explained that the Court considers applications for appeal in the same man-

ner that it treats petitions for certiorari —if four Justices are in favor of receiving briefs and hearing oral argument, an order is entered noting probable jurisdiction. Otherwise, the appeal is summarily dismissed. However the votes cast at this time do not conclude the Justices casting them if the case is granted a plenary hearing. Since votes to affirm summarily, the memorandum went on, are votes on the merits, public expression by a judge before argument and decision might be misunderstood, and so no notation is usually entered as to how the Justices voted. "Plenary consideration can change views strongly held, and on close, reflective analysis precedents may appear inapplicable to varying fact situations" Mr. Justice BRENNAN concluded. "I believe that this approach will obtain in this case despite the unusual notation made today by four of my colleagues."

Mr. Justice CLARK's memorandum explained that *Frank* v. *Maryland* was decided by a five-to-four vote. Since it was similar to the present case, the Court held this case pending the decision of *Frank*. However, when this case was reached, Mr. Justice STEWART disqualified himself because it came from the Ohio Supreme Court where his father was then sitting. The remaining four Justices of the majority in the *Frank* case voted to affirm this case summarily. However, the four members of the *Frank* minority voted to note probable jurisdiction. The memorandum said that the result was "a reconsideration of the constitutional question decided in *Frank* by a full Court . . . very poor judicial administration, especially since *Frank* was decided less than four weeks ago and only an eight-man Court can sit to review the question decided there." Mr. Justice Clark explained that he was noting his adherence to *Frank* to avoid confusion among the Bar. "Otherwise" he said, "my silence would be construed as acquiescence in a reconsideration of that case."

Activities of Sections

(Continued from page 937)

laid by prior Section chairmen. The Section has built on their good work. But it would not have come about without the splendid job done this year by E. Nobles Lowe, of New York, Chairman of our Membership Committee, and his hard-working state chairmen and committee members. A membership of 10,000 has been a goal of the Section for a number of years.

The Business Lawyer continues to be the most important single benefit which the Section offers to its members. Section Secretary Willard P. Scott has produced this year four outstanding issues. Almost every committee of the Section has made substantial contributions. The publication has now established itself as an essential law library reference work. It is subscribed for by most of the major libraries in this country and many abroad.

The influence on American corporation law of the Model Business Corporation Act sponsored by the Section's Committee on Corporate Laws is steadily increasing. This year Iowa was added to the growing list of states which have used the Model Act to modernize their corporation laws. The other jurisdictions are: Wisconsin (1951), Oregon (1953), District of Columbia (1954), Texas (1955), Virginia (1956), North Dakota (1957), Alaska (1957) and Colorado (1958). In addition Maryland (1950) and North Carolina (1955) used it in part.

Under the distinguished and active leadership of Leonard D. Adkins, of New York, the committee has now finished the third year of the four-year project undertaken in cooperation with the American Bar Foundation to annotate the Model Business Corporation Act. Drafts of many of the annotations have already been distributed to the law firms and corporations which are acting as sponsors and furnishing the major portion of the funds for the project. Comments on the draft annotations have been favorable and it appears that the final product will be of real value as a reference work for practicing lawyers as well as a source of information for bar groups interested in the modernization of state corporation acts.

The publishers of the Fletcher Cyclopedia of the Law of Corporations have in preparation a revised volume 19 which will include the full text of the Model Business Corporation Act. In addition, with the cooperation of the National Conference of Commissioners on Uniform State Laws, who have now withdrawn the Business Corporation Act formerly sponsored by them, arrangements now have been completed with Martindale-Hubbell, Inc. to include the Model Act text in the law digest volume published as a part of the Martindale-Hubbell directory.

SECTION OF ADMINISTRATIVE LAW

Members of the Section participated actively in the opening hearings of the U. S. Senate's Subcommittee on Administrative Practice and Procedure on July 21, 22, 23 and 24. Senator John A. Carroll, of Colorado, Chairman of the Subcommittee, declared that "for the first time in thirteen years the Senate has decided to take a good, hard look to determine how the administrative agencies are operating under the Administrative Procedure Act . . . and further to determine how these agencies are exercising the power delegated to them by the Congress".

Section Chairman John B. Gage presented testimony in support of S. 2374, the Association-sponsored bill based on the work of the Section's Committee on Code of Agency-Tribunal Standards of Conduct. He discussed in detail the need for the legislation as a means of curbing improper *ex parte* communications and influence in court-like proceedings of administrative agencies. Donald C. Beelar, Last Retiring Chairman of the Section, explained to what type of proceedings and to whom S. 2374 would apply. President-Nominee John D. Randall stressed that "Justice and fair play in agency proceedings cannot be assured unless we can effectively outlaw back door pressures and influence in hearing proceedings."

Testimony in support of Title I of S. 600, which would establish an independent office of Federal Administrative Practice, was presented by Ashley Sellers, Robert M. Benjamin and Frank Reifsnyder.

What's New in the Law

The current product of courts, departments and agencies

George Rossman · EDITOR-IN-CHARGE

Richard B. Allen · ASSISTANT

Courts . . .
right to mandamus

A lawyer may be an "officer of the court", but in Ohio that status does not give him the "beneficial interest" needed to maintain a mandamus suit against a judge for the purpose of making the judge comply with a statute requiring filing of judicial-work reports.

This is the ruling of the Supreme Court of Ohio in turning out of court a Cleveland lawyer who sought the mandamus against the Chief Justice of the Court of Common Pleas of Cuyahoga County [Cleveland]. The lawyer wanted the judge to follow a 1953 statute that provides that common pleas judges "shall" make monthly reports to the chief justice who "shall file a complete annual report . . . [showing] the work performed by the court and by each of the judges thereof, [and] the number of days and hours of attendance in court . . ." He claimed specifically that the Chief Justice had not prepared or distributed forms to the judges for their reports and that he had not filed his annual report for 1955, 1956 and 1957. In seeking the writ of mandamus he relied on his status not only as a lawyer, but also as a citizen and taxpayer.

Following an Ohio statutory provision that mandamus is available only to a "party beneficially interested", the Court declared the relator's status as a member of the legal profession did not give him the necessary "beneficial interest", which it defined as an interest that is different from and transcends that of other citizens, taxpayers or lawyers. A lawyer, simply because he is a lawyer, the Court continued, does not have a "beneficial interest in the enforcement of a statute dealing with the performance of judicial functions".

The lawyer contended that the purpose of the judicial reports statute was to provide a method to reduce delay and relieve congestion in the Cuyahoga County courts, and that his maintenance of the suit was a civic duty. The Court thought this was "commendable" but it noted that he did not allege that either he or a client ever had been discommoded by delay. The Court did not say, however, except by implication, that a personal experience with delay or congestion would supply the "beneficial interest" needed to petition for a writ of mandamus.

(*Ohio ex rel. Harris* v. *Silbert*, Supreme Court of Ohio, June 3, 1959, Peck, J., 169 Ohio St. 261, 159 N. E. 2d 439.)

Criminal Law . . .
detention and confessions

The Court of Appeals for the Second Circuit has reversed a conviction where the judge in a federal court trial allowed in evidence admissions made by the defendant to federal officers while he was being detained illegally by state authorities.

The accused was arrested by local New York enforcement officers at 9:30 o'clock in the morning; he made incriminating statements at about midnight that night to Federal Bureau of Investigation agents who saw him in a state jail while he was still being held by the local police.

The parties agreed that the detention was illegal under New York law and that had the arrest and detention been made by federal officers the statements would have been inadmissible because the detention violated Rule 5(a) of the Federal Rules of Criminal Procedure. But in this case the admissions were made while the defendant was detained by state officers.

The Court turned to the Supreme Court's 1943 decision in *Anderson* v. *U. S.*, 318 U. S. 350, in which the high court held that illegal detentions by local police would exclude statements in federal trials if there was a "working arrangement" between the federal and state officers. The Government argued that there was no "working arrangement" because the evidence showed that neither the arrest nor detention were at the express or implied direction of the F.B.I.

But the Second Circuit, differing with the interpretation of the phrase by the Fifth Circuit, said a "working arrangement" existed whenever the local police permitted federal agents to interview their prisoners.

(*U. S.* v. *Coppola*, United States Court of Appeals, Second Circuit, July 20, 1959, Waterman, J.)

Criminal Law . . .
prosecutor's argument

A Florida prosecutor has lost a murder conviction and death penalty because some remarks in his final argument have been held to be reversible error by the Supreme Court of Florida.

Two separate sets of remarks in the prosecutor's summation were attacked. The first was a pointed statement that only the defendant had a right of appeal and that the state was having its final day in court. The other was that he had held a conference with his staff to determine whether the case justified "the State's giving maximum punishment". The defense counsel objected to the second statement before it was finished, but the Court inferred that the prosecutor meant to impress the jury with his and his staff's con-

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

viction that this was a case for the death penalty, because the prosecution had queried the jurors on the voir dire about their attitudes toward capital punishment. The statement about the defendant having the only appeal was not objected to.

With two judges dissenting, the Court held that both remarks were prejudicial error; moreover, they did not fall within the category of harmless error, despite the conceded overwhelming evidence of guilt. The Court explained that the harm resulted from possibly deterring the jury from making a mercy recommendation, which is the prerogative of the jury under Florida procedure and which precludes the death penalty. Thus, the Court reasoned, the error was not harmless. "[E]rrors which could make the difference between life and death can hardly be deemed harmless and trivial," it declared.

The Court said its concern that the prosecutor's remarks had such an effect was illustrated by the fact that after having deliberated a couple of hours the jury returned and asked the minimum years the defendant would have to serve if he were found guilty with a recommendation of mercy.

As to the error in the remarks, the Court said those about the state having its last innings not only were erroneous but also invited the jury to "disregard their own responsibility in the matter and leave it up to the Supreme Court". On the other statement, the Court asserted that it would have been proper for the prosecution to urge the death penalty on the basis of the evidence, but that it was improper to advise the jury to give the death sentence because he and his staff had arrived at that conclusion on the basis of their pretrial investigation.

The two dissenters thought the error in the remarks was harmless and that the conviction should not be reversed.

(*Pait* v. *Florida*, Supreme Court of Florida, March 11, 1959, rehearing denied May 27, 1959, Thornal, J., 112 So. 2d 380.)

Federal Taxation . . . *"useful life"*

A car rental company's claim that the declining balance method of depreciation is available to it in computing the depreciation allowance on its automobiles has been turned down by the Court of Appeals for the Third Circuit.

The case turned on whether the phrase "useful life", as used in §167(c) of the Internal Revenue Code of 1954, means the physical life of the asset for business purposes or the period during which the asset is useful to and held by the taxpayer. The declining balance method, authorized by the 1954 Code, cannot be used with respect to an asset whose useful life is less than three years. The taxpayer's average holding period for rental cars was 26.17 months. Therefore, in order to use declining balance, the taxpayer had to convince the Court that "useful life" meant the physical life of the cars rather than the length of their useful life to it.

After examining court decisions, administrative interpretations and expert accounting opinion, the Court concluded that "useful life", while first appearing in the Code in 1954, has had a long career in the regulations and that it always has meant the "period of usefulness of the asset to the taxpayer in his business".

The circuits are not in complete harmony on this question. The Ninth, in *Evans* v. *Commissioner*, 264 F. 2d 502, has held that useful life means economic life. The Fifth (*U. S.* v. *Massey Motors, Inc.*, 264 F. 2d 552) and the Sixth (*Cohn* v. *U. S.*, 259 F. 2d 371) agree with the instant case.

(*Hertz Corporation* v. *U. S.*, United States Court of Appeals, Third Circuit, July 6, 1959, Staley, J.)

Federal Taxation . . . *gift or income?*

A most troublesome problem in income tax law has been determining whether a variety of payments are taxable compensation or tax-free gifts. The Court of Appeals for the Second Circuit has wrestled again with this one and has ruled that the payment under consideration was not a tax-free gift.

The taxpayer had served as president of a corporation that managed the real estate of Trinity Church in New York City; his salary was $22,500. When he resigned the corporation voted him $20,000, which a resolution termed "a gratuity . . . awarded to him in appreciation of the service rendered . . . provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued . . ." It was undisputed, however, that the directors thought the taxpayer had no such pension rights.

The Court, pointing out that *Bogardus* v. *Commissioner*, 302 U. S. 34, won by the taxpayer on a five-to-four vote, is the only Supreme Court case in the field, admitted that the law is anything but clear. But, it said, at least in the Second Circuit, the test is whether the amount is "by way of more compensation for a deserving employee or merely to satisfy the employer's desire to become a benefactor". Applying this doctrine, the Court felt the payment was "for practical purposes" the result of satisfaction with the way the taxpayer had operated the corporation's real estate. Thus, it concluded, the payment was taxable.

In one kind of compensation-vs.-gift case—payments to clergymen—the taxpayer has been uniformly successful. The Court attributed this to the presence of personal gratitude and affection on the part of the employer, and it found no evidence that personal affection for the taxpayer entered into the payment in the instant case.

One judge, dissenting, pointed out that the payment was in no way geared to the taxpayer's salary, and could hardly be considered additional compensation in view of the adequacy of the salary. He thought it inescapable that the payment was motivated by "good will, esteem or kindliness" [quoting from Justice Brandeis' dissent in *Bogardus*] rather than a more complete requital for past services, and was therefore a gift.

(*Stanton* v. *U. S.*, United States Court of Appeals, Second Circuit, July 6, 1959, Hand, J.)

Hatch Act . . . *application to official*

Rejecting arguments that the Hatch

Political Activities Act did not apply, the United States Civil Service Commission has ruled that the Director of the Department of Conservation of Illinois violated the Act under circumstances requiring his removal from office.

There was no doubt or argument that the respondent, who has been in his present position since 1953, had engaged in political activity: he was a Republican precinct committeeman and chairman of his county central committee. But he made two principal arguments that his position was not subject to the Act.

He contended, first, that he held an "elective" office exempted by the Act because his appointment by the governor was subject to confirmation by the state senate, which action was an "election". The Commission would not accept this position, and it refused to read into the section of the Act dealing with state officers the language of another section that exempts appointed heads of federal departments.

The other main argument turned aside by the Commission was that the doctrine of *de minimis non curat lex* should apply to dismiss the proceeding. The Commission in effect accepted the respondent's estimate that he spent but one per cent of his time on activities financed with federal funds, but it emphasized that the persons who spent all their time on those projects were officials in the Department of Conservation and thus subordinate to the respondent in his position as director.

(*Matter of Palmer*, United States Civil Service Commission, July 7, 1959, Docket No. 226.)

Labor Law . . . *right to work*

The Supreme Court of California, in two cases, has held that "right-to-work" ordinances enacted by two counties are invalid because they conflict with both the legislatively declared general labor policy of the state and specific implementations of the policy.

Although the point was raised, the Court did not decide whether the county enactments were ineffective because in a field pre-empted by the Federal Government. It was unnecessary to reach this question in the first case, the Court explained, because interstate commerce was not involved. "We cannot assume", the Court said, "that the national act has taken hold of the conduct here involved." In the second case, the question was left open as one of fact for the trial court to decide.

In the first case all three parties —the employer, a majority of his employees and the union—wanted to enter into a union shop agreement, but were prevented from doing so by the county "right-to-work" ordinance. The employer sought an injunction against the union requiring it to desist from demands for any type of union security; he declared he would be subject to a suit for damages under the ordinance if he executed a union-shop contract.

Ruling that state regulation of the field was so complete and detailed as to exclude local regulation, the Court declared: "The Legislature has not enacted a completely detailed scheme of regulation of the 'field' which this ordinance is principally designed to affect, i.e., the legality of jurisdictional (or jurisdictional-organizational) strikes and of union shop or security agreements and conduct intended to attain or enforce such agreements, but it has declared both a general policy and basic regulations in implementation thereof which, as we view them, are fully comprehensive of the field." In examining state legislation the Court found the "paramount principle" to be the "welfare of the individual workmen, through the principle of freedom to associate, organize and bargain collectively . . ." The "right-to-work" ordinance, in denying the employer and labor the right to make a union shop agreement, violated this principle, the Court concluded. The conduct was held not to violate state policy since the union represented a majority of the employees.

One judge concurred with the observation that the field had been occupied by federal and state constitutional provisions protecting the right to contract as a "natural and inalienable" right.

(*Chavez* v. *Sargent*, Supreme Court of California, May 19, 1959, Schauer, J., 339 P. 2d 801.)

In the other case the tables were turned. Neither the employer nor a majority of the employees wanted a union shop agreement. The union did. The employer sought injunctive relief against organizational picketing or coercion.

The Court held the county "right-to-work" ordinance, on which the suit was based, invalid, but it permitted the suit to stand because of a basis for relief under state law. A preliminary injunction was undisturbed insofar as it did not refer to the invalid ordinance.

Two judges, although concurring, disagreed with the majority's action in allowing the suit to stand. They said there was no showing that the union's activity could be unlawful under state law.

(*Retail Clerks' Union, Local No. 1364* v. *Superior Court*, Supreme Court of California, May 19, 1959, Schauer, J., 339 P. 2d 839.)

Patent Law . . . *advertising*

A non-lawyer "registered patent attorney" has failed in his attempt to void the Commissioner of Patents' advertising ban that went into effect July 1 of this year. The Court of Appeals for the District of Columbia Circuit has ruled that the regulation is "not unreasonable and, therefore, not invalid".

The proscription against advertising, consisting of an amendment to Rule 1.345 of the Rules of Practice of the Patent Office, forbids the use of "advertising, circulars, letters, cards and similar material to solicit patent business". The amendment proved particularly bothersome to the unlicensed but "registered patent attorneys" who, uninhibited by the Canons to which their licensed brethren have had to conform, have been accustomed to passing out all kinds of advertising novelties. In fact, the person who challenged the regulation in the instant case asserted that he would be forced out of business if he could not continue the advertising that had been permitted to him by the Patent Office prior to the amendment of Rule 1.345.

The Court held that the Commis-

sioner of Patents had authority under 35 U.S.C.A. §31 to issue the regulation and that the authority was not circumscribed by 35 U.S.C.A. §32, which provides for suspension or exclusion from practice for advertising with "intent to defraud in any manner". The Court said the two sections should be read together: one providing a ground for disbarment and the other providing authority for regulations.

(*Evans* v. *Watson*, United States Court of Appeals, District of Columbia Circuit, July 16, 1959, *per curiam*.)

Physicians . . . *society membership*

Dr. Frank Riggall is a persistent man. He wants to be a member of his county medical society—the Washington County [Arkansas] Medical Society—because his admission to the Arkansas Medical Society and the American Medical Association depends on local membership.

The problem he faces is that the Washington County group won't let him in. Its by-laws require a three-fourths favorable vote for membership. He has been unable to attain that. Dr. Riggall decided to do something about it. A few years ago he sued the Society for damages because of its refusal to admit him. His suit was dismissed by the federal district court, and the Court of Appeals for the Eighth Circuit affirmed. 249 F. 2d 266 (44 A.B.A.J. 171; February, 1958.)

Now Dr. Riggall has tried the shot from another angle. He is a 25 per cent shareholder of Elizabeth Hospital, Inc., which operates a hospital at Prairie Grove, in Washington County. Elizabeth Hospital, Inc., sued the county society and its officers, seeking treble damages of $300,000 under the Sherman Act and an injunction requiring that Dr. Riggall be admitted to membership in the county society. There was also an allegation that the constitution, statutes and common law of Arkansas were violated by the doctor's exclusion.

Affirming another dismissal by the district court, the Eighth Circuit found there was no Arkansas law of any kind involved. It ruled that the operation of a hospital, although including treatment of patients from outside Arkansas and purchase of supplies from other states, is not interstate commerce and that therefore the Sherman Act is not applicable.

(*Elizabeth Hospital* v. *Richardson*, United States Court of Appeals, Eighth Circuit, July 10, 1959, Vogel, J.)

Post Office . . . *obscene literature*

Fresh from its cinema-version victory in the Supreme Court of the United States (79 S. Ct. 1362), *Lady Chatterley's Lover* in its original novel form has escaped from a mail ban imposed by the Postmaster General in June.

The United States District Court for the Southern District of New York ruled that the Postmaster General's judgment that the book is obscene and therefore non-mailable "is contrary to law and clearly erroneous". It was not necessary in view of this disposition of the case for the Court to consider constitutional questions, but it remarked that if the obscenity statute were construed to bar *Lady Chatterley's Lover* from the mails the statute would be unconstitutional in its application.

Praising the literary qualities and standing of the novel, the Court emphasized that it must be judged as a whole and in the context of the times as to whether its dominant theme is to appeal to prurience. The Court found that this was not its dominant purpose. "The book is not 'dirt for dirt's sake' ", it declared. The Court conceded there may be some lurid passages in the story, but it said these parts did not "submerge the dominant theme so as to make the book obscene even if they could be considered and found to be obscene in isolation".

The Court concluded: "I hold that, at this stage in the development of our society, this major English novel does not exceed the outer limits of the tolerance which the community as a whole gives to writing about sex and sex relations."

(*Grove Press, Inc.* v. *Christenberry*, United States District Court, Southern District of New York, July 21, 1959, Bryan, J.)

United States . . . *conflict of interests*

The United States has failed in its attempt to escape payments under the so-called Dixon-Yates contract on the ground that the contract was illegal and therefore unenforceable. The United States Court of Claims has turned down the Government's argument that the contract was void because of the part played in its inception and negotiation by Adolphe Wenzell, who was an employee of the First Boston Corporation, which shared in the financing of the corporation that contracted with the Government. Two judges dissented from the Court's decision that there was no conflict of interest.

The suit was brought by Mississippi Valley Generating Company for itself and on behalf of others who had furnished materials or services pursuant to the contract. The company had agreed with the Government to build an electric generating plant and to sell the energy from it to the United States. The Government cancelled the contract when the need for the electricity was filled from another source. Mississippi Valley was met by several defenses, the principal one being that of conflict of interest.

Mr. Wenzell's implication in the contract was this. He served as a part-time consultant to the Bureau of the Budget, receiving no compensation but entitled to expenses. He did not leave the employ of First Boston. He had made a study concerning the extent of governmental subsidization of the Tennessee Valley Authority and later, during the contract negotiations, he acted as a sort of expediter between the United States and the Dixon-Yates group that later formed Mississippi Valley. He had numerous meetings, conferences and telephone calls with the contracting parties individually and together; he helped obtain an analysis of the proposals submitted by Dixon-Yates; and, specifically, he provided Dixon-Yates with the figure they used in their proposal as the interest rate they would have to pay on money borrowed for the project.

The majority of the Court concluded that these activities were not within the conflict of interests statute, 18 U.S.C.A. §434, on which the Govern-

ment relied, and which provides criminal penalties, "nor were they such as to render the contract in question unenforceable on grounds of public policy". The Court emphasized that First Boston, Wenzell's employer, was not a party to the contract, nor was there any commitment or agreement, direct or indirect, that it would do the financing for the Dixon-Yates group. Indeed, the Court pointed out, the group felt free to place it elsewhere and 40 per cent of the financing went to Lehman Brothers. The only interest of First Boston in the contract arose after Mr. Wenzell left his position with the Government.

The highest interest that Mr. Wenzell or First Boston had, the Court said, was a hope of being selected as the Dixon-Yates finance agent. "To treat such a prospect, or hope, or even mistaken belief in a nonexistent understanding, as a direct or indirect interest, subjecting the possessor of it to a fine or imprisonment or both, would seem to us to require that we discard all that the Supreme Court has taught us as to how to interpret a criminal statute", the Court declared.

Saying the Government's defense had "something essentially cynical" about it, the Court pointed out that Mr. Wenzell was brought into the negotiations by the United States and urged to continue in them by it. The question of Mr. Wenzell's possibly conflicting position had been raised by an attorney for the Dixon-Yates group, and First Boston's counsel advised him to resign from Government employ. The Director of the Budget saw no need for alarm and continued to assign him tasks in the negotiations.

This led the Court to remark: "So the two entities that had the power to remove Wenzell from the scene, the Government and First Boston, did not do so, and the entity that urged his removal but had no power to effect it [Mississippi Valley], is sought to be made the victim of his nonremoval."

The Court rejected several other defenses raised by the Government.

The two dissenters, one of whom was retired Supreme Court Justice Reed, sitting by designation, declared that the statute applied to the case. One said it covered the "interest" of Mr. Wenzell as a person, rather than First Boston, even if it be assumed that First Boston did not have an interest until after Mr. Wenzell resigned. This personal "interest", he said, arose from the fact that Mr. Wenzell received a bonus based on the amount of business he brought First Boston, which eventually did get 60 per cent of the financing. The other dissenter thought it implicit in the negotiations that First Boston would get the financing.

(*Mississippi Valley Generating Company* v. *U. S.*, United States Court of Claims, July 15, 1959, Madden, J.)

What's Happened Since . . .

On June 29, 1959, the Supreme Court of the United States:

REVERSED (79 S. Ct. 1362) the decision of the New York Court of Appeals in *Kingsley International Pictures Corporation* v. *Regents of the University of the State of New York*, 4 N. Y. 2d 349, 151 N.E. 2d 197 (44 A.B.A.J. 978; October, 1958). The New York Court had upheld the refusal of officials to license a motion picture version of *Lady Chatterley's Lover* on the ground that it portrayed adultery as a "desirable, acceptable or proper pattern of behavior", contrary to a statutory proscription. The Supreme Court reversed, the majority opinion holding the statute unconstitutional as violative of freedom-of-speech guarantees.

REVERSED (79 S. Ct. 1376) the decision of the Court of Appeals for the Ninth Circuit in *In re Sawyer*, 260 F. 2d 189 (44 A.B.A.J. 779; August, 1958). The Supreme Court of the Territory of Hawaii had ordered the respondent's suspension from the practice of law for one year (41 Haw. 403) and the Ninth Circuit affirmed. The Supreme Court reversed, holding that the public remarks which the respondent made concerning a Smith Act trial in which she was participating currently as a defense counsel did not impugn the trial judge or constitute an improper attack on the administration of justice as represented by the trial.

REVERSED (79 S. Ct. 1400) the decision of the Court of Appeals for the District of Columbia Circuit in *Greene* v. *McElroy*, 254 F. 2d 944 (44 A.B.A.J. 574; June, 1958). The lower courts had ruled that the Government properly revoked the plaintiff's security clearance, which resulted in his loss of employment as an engineer for a Government contractor. The Supreme Court reversed, declaring that in the absence of explicit authorization from either the President or Congress, the Department of Defense was without authority to deprive the plaintiff of his position in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.

NOTE: In the digest of *Lyons* v. *Paul*, 321 S.W. 2d 944, which appeared in "What's New in the Law" in the June, 1959, issue (45 A.B.A.J. 619) it was incorrectly stated in the second paragraph that the Negro woman had sent some "documents" to the opposing counsel. The digest should have stated that she sent some "copies of documents".

Department of Legislation

Charles B. Nutting, Editor-in-Charge

The problem of making statutes effective, in spite of its importance, has received relatively little consideration. Professor Rose brings a new point of view to the matter. His comments are drawn from a paper presented at the 1958 Annual Meeting of the Association of American Law Schools and published in 11 JOURNAL OF LEGAL EDUCATION 470 (1959).

Some Sociological Considerations in Making Statutes More Effective

By Arnold M. Rose, Professor of Sociology, University of Minnesota

Sociologists have made very few studies about the effectiveness of various forms of legislation in gaining compliance from the population, but they have developed some tangential knowledge which can be used to form hypotheses that deserve testing in order to make statutes more effective. Sociologists know a good deal about how a traditional social structure molds individual human behavior, and when the law is recognized to be a part of the social structure sociologists will be enabled to see how law plays its role in this social process. Within limits, statutes specify the *form* of most social institutions, especially the secondary and recently developed institutions of a society,[1] and we know that the form or structure of an institution helps to determine the behavior which takes place within that institution. Let us raise some of the specific research questions and hypotheses that sociologists, with their characteristic framework of thinking about man in society, would like to raise.

In the first place, what is perceived to be, in a given culture, the proper role of law? With some slight exaggeration, one might point out the difference between the Latin countries in which the Justinian Code and the Napoleonic revision of it have molded tne popular conception that all public behaviors are to be spelled out in the constitution and statutes, as contrasted with the Anglo-Saxon conception that law has a much more limited sphere and that individuals or sub-groups in society have free choice except when the law sets restrictions. One practical implication, perhaps trite, of this observation is that when a statute is to be enacted to control some phase of human behavior in cultures molded by Anglo-Saxon conceptions of law, these statutes should make implicit their proper relationship to those spheres of public behavior which are popularly considered to be controllable by law in the interest of the general welfare and public policy. Another way of stating this proposition is to say that Americans are more likely to conform to the requirements of a new statute if it does not *appear* to go much beyond what is already found in the law.

While legislative remedies cannot be effective in all spheres of public behavior, preambles to such statutes which justify them in terms of prevailing cultural values—democratic, moral, and religious—will enhance their acceptance. These preambles will have no magical effect in themselves, but would furnish arguments in the discussion over the law. Leaders of public opinion often consider the philosophical bases of the practical issue they are debating and hence often pay attention to the preambles. They then casually introduce the philosophic premises derived from the preambles into the public discussion over the given statute. Americans like to think of themselves as a democratic, moral and religious people, and if a good case can be made that a given piece of legislation fits in with these values, such legislation is more likely to be acceptable.

When the question of the effectiveness of sanctions is raised, the *prevailing* public behavior has to be considered. Sanctions will have differing effectiveness when typical behavior, in the absence of the statute, is generally in accord with, opposed to or completely independent of the purpose of the statute. Under each of these three different sets of circumstances, the sanctions specified in the statute, to be effective, would have to be different. It might be hypothesized that the usual punitive sanctions of fine or imprisonment are likely to be more effective where the prevailing behaviors of the majority of the population are already in accord with the goals sought by the statute. In this situation it is only a minority that must be brought into conformity with the law, and the general population will be inclined to believe that punishment is justified for infraction. On the other hand, where the behavior sought by the statute is rarely found in the population, it seems likely that some kind of reward would be more likely to achieve the goal of the legislature. Framers of statutes have perhaps not often thought of rewards as sanctions, but this is no reason why they should not use certain rewards, such as public decorations, forgiveness on portions of the income tax, free use of public facilities for which a fee is normally charged, and so on.[2]

Where there is little public knowledge of the behavior sought in the statute, it seems likely that the formation of an agency that gives publicity to violations of the statute would be an effective provision, and that investigation and publicity might serve to gain conformity to the statute in lieu of sanctions. The public reprimand has been effectively used by military authorities as a means of gaining conformity, and it is reported that Soviet criminal law provides that the punishment for certain offenses may be in the form of a "public rebuke".[3] In general, each of

1. For example, see Arnold M. Rose, *Theory and Method in the Social Sciences* (Minneapolis: University of Minnesota Press, 1956), Chapter 4.

2. The Russian government seems to have effectively used rewards quite frequently.

3. Waite, THE PREVENTION OF REPEATED CRIME, 15 (1943).

the possible sanctions usable in statutes should be considered in relationship to the extent of prevailing conformity to the expectations of the statute and to the degree of public knowledge concerning both the expected behavior and the statute itself.

I am not personally equipped to examine the effectiveness of the full range of sanctions which are known to lawyers and legislators, although I believe that sociological research could make a contribution here. Professor Frank E. Horack, Jr., states: "Unfortunately legislative failure to consider the means by which statutory policy may be enforced is one of the predominant characteristics of modern legislation ... the draftsman concentrates on policy and administration and then adds without thought or consideration a section or two providing for fine and imprisonment."[4]

Perhaps one of the difficulties is that the draftsman does not know the effectiveness of or the public's or the offender's reaction to, a given sanction. Certainly we know of instances in which a poor sanction resulted in greater nonconformity than was found in the population before the passage of the legislation. I have employed a simple technique of attitude research to find out what sanctions a section of the public thinks most appropriate for certain kinds of criminal behavior, according to the characteristics of the offender, and I believe that this technique—when further developed and used on more representative cross-sections of the public—could tell us much about the likely effectiveness of various sanctions.[5]

Should a statute be passed when it can be anticipated that a significant proportion of the usually law-abiding public will ignore it or violate it? What is the effect of seeing a law violated frequently by ordinary respectable citizens and by people who are in positions of leadership? Our general knowledge says that this does no good for the respect for law. On the other hand, if it is made plausible that the statute is necessary for the continued existence of the society itself, and that most people are conforming to the larger values of which the specific statute is only a small part, respect for the specific statute will not necessarily be diminished. Examples can be given from the area of traffic law violations. While we see frequent violations of the traffic laws, even by many so-called "respectable people" (including some of us), there is probably no diminution of the general respect for laws governing traffic control because of the widespread recognition that it is literally essential to have such laws to maintain the movement of persons and goods. In other words, many people frequently violate specific statutes but still have respect for the idea that there must be rules of the road and in their behavior manifest general conformity to most of these rules.

Some might find that there is too much transfer from this observation to the one I am about to make: It is possible to pass partially effective legislation covering the civil rights of minority groups even when there is widespread violation of those rights without diminishing respect for law. This is true if it is made clear that the civil rights being defended by the legislation are in accord with the generally defended interest in fair play and are necessary for the general democratic organization of our society. That is, it is possible to pass partially effective laws, for example, which are designed to insure that Negro citizens are allowed to vote, as the right to vote is an obviously inherent element of political democracy. Similarly, every other facet of valued social life can be considered as a reason for gaining conformity to law: each institution, bond, and interdependency of society includes such values.

Sociologists have studied sub-cultural differences within a society and are strongly aware of the fact that given laws have different *meanings* for different segments of the population. It would seem that to gain the same effect on all people's behavior, statutes would have to be framed somewhat differently for different cultural groups in the population. On the other hand, it is a generally accepted principle of American law that statutes cannot make a distinction between people based on their different cultural backgrounds or position in society. Yet the facts of cultural difference need not necessarily work against the principle of nondiscrimination. If, in the very formulation of a statute, some studies are made to find out the varying interpretations of the prospective statute for the different segments of the society—especially according to ethnic background, region, and social class—there would be a better opportunity to create a more widely understood statute, and one would gain greater conformity to the principle sought. Using a more general language for the statute, and introducing qualifying clauses that permitted certain kinds of exceptions, would likely provide better opportunities for the various sub-groups in the society to adjust to the law and hence to conform more closely to the intention of the law. A simple example would be the exemption in prohibition laws to allow the use of intoxicating liquor in religious ceremonies. While considering prohibition laws, one can wonder why such laws did not prohibit the public display of drunkenness rather than the manufacture and sale of liquor, since it is customary for certain cultural groups to drink, regularly but in moderation, without ever getting drunk.

The above are merely a few of the suggestions that might come from a sociological consideration of the application of law to the control of human behavior.

In the United States we have the opportunity to conduct field experiments as a result of the fact that there are forty-nine different legislatures legislating with different means to attain the same goal. The differential effectiveness of various state statutes designed to achieve the same purpose may be systematically studied under fairly controlled conditions by this means.[6] For example, it would be

(Continued on page 989)

4. Cases and Materials on Legislation, 2d edition (Chicago: Callaghan and Company, 1954), pages 176-177. Professor Horack's book provides one of the better discussions of this topic. Also see Horace E. Reed and John W. MacDonald, Cases and Other Materials on Legislation (Brooklyn: The Foundation Press, 1948) Chapter 4. These sources were brought to my attention by my colleague, Professor Robert C. McClure.

5. Arnold M. Rose and Arthur E. Prell, "Does the Punishment Fit the Crime? A Study in Social Valuation." 61 American Journal of Sociology 247-259 (November, 1955).

6. An example of this kind of study is offered in Arnold M. Rose, *Needed Research on the Mediation of Labor Disputes*, 5 Personnel Psychology, 187-200 (Autumn, 1952).

Tax Notes

Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, Kenneth H. Liles, Chairman; John M. Skilling, Jr., Vice Chairman.

Should the Government Reimburse Taxpayer's Attorneys' Fees in Tax Litigation?

By Louis M. Brown, Los Angeles, California

In general, tax litigation falls into three principal categories: (1) Tax Court petitions, (2) refund suits in Federal District Courts and the Court of Claims, and (3) defense of criminal cases. There are, of course, other kinds of U. S. tax litigation, such as suits by the Government to collect taxes, pursuit of government liens, occasional cases brought by taxpayers to enjoin the Government's tax procedure and proceedings to quash subpoenas or for contempt of process.

In tax proceedings the adversary parties are the Government, represented by government counsel whose compensation is paid by public funds, and the private taxpayer, represented by private counsel whose compensation is paid by the taxpayer.

The Tax Court is the forum of the greatest amount of tax litigation. Cases follow a typical pattern. A case arises in the Tax Court out of an act (transaction) or failure to act of a taxpayer, which act or failure to act gives rise to actual, or alleged, tax consequences. The taxpayer reports, or fails to report, the transaction on his income tax return. His return is examined a year or more later, which examination involves a serious review of his return and the transactions in which the taxpayer was involved. Special attention is usually given to a few items resulting in the Government's proposed assertion of a deficiency. Administrative proceedings ensue. No agreement being reached, a ninety-day letter follows. A Tax Court petition is filed. Further pleadings bring the matter to issue. Conferences involving possible settlement negotiations or fact stipulations proceed. The case is prepared for trial. It is tried, submitted, and then follow briefs. If the taxpayer loses, he may appeal and go through all the steps involved in Court of Appeals procedure. At all stages the taxpayer may, and except in rare cases does, employ counsel. Except in rare instances counsel is engaged, if not earlier, then at least after the ninety-day letter is issued.

The two kinds of cases which most seriously highlight the point of this tax note are (1) cases which the taxpayer wins in the Tax Court because the Tax Court had already decided one or more similar cases for the taxpayer, but the Commissioner has nonacquiesced,[1] and (2) cases which the taxpayer loses in the Tax Court but wins on appeal because the Court of Appeals to which the case is appealed previously determined the issue in the taxpayer's favor.[2]

It is not the purpose of this note to criticize or comment on the validity of the Commissioner's power to nonacquiesce,[3] nor the validity of the Tax Court's decision which is certain to be reversed.[4] There are, no doubt, arguments pro and con on the merit of the positions taken by the Commissioner and the Tax Court. But what about the position of the poor (or rich) taxpayer who is subjected to the expense, the time and the trouble to defend the tax consequences of his position? It is virtually impossible to give a satisfactory explanation to a taxpayer caught in the net between the Commissioner and the Tax Court, or between the Tax Court and a Court of Appeals. This is a dispute not of his making and over which he had, or has, no control but for which he must bear the costs. The fact that there are in our society many times when a person is called on to protect his interests as a result of circumstances thrust upon him does not mean that every such situation is tolerable, or proper, or desirable, or "just".

The taxpayer might urge in this situation that, if the Commissioner disputes with the Tax Court, or if the Tax Court disputes with the Courts of Appeals, it is sufficient if "I, the taxpayer, am the subject of the dispute without also causing me to expend sums to defend my position." In such cases it would seem reasonable for the taxpayer successful in the litigation to be reimbursed some, or all, the costs incurred by his being a test case. Such reimbursement, in theory at least, would not frustrate the argument between the Commissioner's non-acquiescence and the Tax Court's integrity. It would, though, make more understandable to such a taxpayer that the public service he performs in being made a testing ground is recognized as a public service.

The argument goes much farther. It includes any successful litigating taxpayer. In any case in which the trial by combat[5] occurs, the combatants are the Government (counsel paid by taxpayer's money) against the taxpayer (counsel paid by taxpayer). The Government performs a paramount public service in enforcing the revenue laws, and the public should well support the Government's efforts in this direction, perhaps in far greater measure than now occurs. But, the taxpayer who successfully defends his tax position equally performs a useful social function in our society. He also points the way to proper enforcement of the tax

1. *E.g.* cases dealing with payments to widows of deceased employees, *Albert W. Morse*, 17 T.C.M. 261 (1958). For an earlier case on similar facts, see *Louise K. Aprill*, 13 T.C. 707, Nonacq. 1957, 2 Cum. Bul. 8, and see in general, E. Groh, *Voluntary Payments to an Employee's Widow*, 36 TAXES 333 (1958). The Commissioner conceded the correctness of these cases in T.I.R. #87 dated September, 1958.

2. *Neil Sullivan*, 241 F. 2d 46, 57-1 U.S.T.C., ¶9399 (7th Cir. 1957). *Stacey Manufacturing Co.*, 237 F. 2d 605, 56-2 U.S.T.C. ¶1008 (6th Cir. 1956).

3. See, Mertens, LAW OF FEDERAL INCOME TAXATION, §50.94.

4. See, *e.g.*, *Heresy in the Hierarchy*, Tax Court rejection of Court of Appeals' precedents, 57 COL. L. REV., 717 (1957).

5. Frank, COURTS ON TRIAL, Chap. VI, "The Fight Theory v. the Truth Theory", (Princeton, 1949).

laws. The fees incurred to sustain his correct tax position should, arguably, be as much a public cost as is the cost of urging the Government's position.

Within this thesis some line can be drawn. It is only the successful litigant for whom the reimbursement is urged. The unsuccessful litigant still must bear all his own costs. The line between the successful and unsuccessful litigant is drawn partly on theoretical and partly on practical grounds. Theory could lead to one of two results. We could argue that only successful litigants have made a socially desirable contribution—demonstrated by their victories. But, there are jurisprudents[6] who argue that the assertion of one's rights is in itself a valuable social contribution so that for such a jurisprudential theory even the unsuccessful litigant performs a socially useful task. We need not engage in the polemics of such jurisprudential theory to decide against granting an award to the unsuccessful litigant. On practical grounds, the unsuccessful litigant can well understand that his loss does not justify the further expenditure of public funds into his pocket. And, the further practical ground that undue litigation should not be encouraged seems a compelling ground to decline to reimburse the loser.

Another, but not so rigid, line can be drawn. It is not necessary that *all* costs be reimbursed. The amount of reimbursement could be at a ceiling of a "reasonable" amount. Such an amount is the "reasonable" amount to be reimbursed from public funds, which amount is not necessarily equivalent to the "reasonable" amount to be charged by counsel. Such a distinction is known in our legal system. In numerous contracts (for example, in many leases and negotiable notes) provision is made for the award of reasonable fees to the successful litigant. Counsel fees to counsel for the successful litigant are not necessarily limited to the amount of the award.[7]

The implications of the suggestion for reimbursement of a reasonable amount of fees are numerous. The principal purpose of this note is to advocate consideration of the idea; not to advocate the idea at this time.

What would be the effect of the reimbursement? Would it encourage litigation? Would it make settlement more, or less, difficult? Would it discourage governmental enforcement machinery? Would it make the Government more cautious, or perhaps too cautious, in the pursuit of the revenue? Would it make taxpayers too bold in the pursuit of their tax positions? What would be the cost? Would it be necessary to set up additional judicial machinery to determine the amount of reasonable reimbursement? Is "right to reimbursement" a "right" which needs a remedy?

We can speculate about the answers. Except in rare cases it is hardly likely that possible reimbursement would encourage litigation, or encourage the taxpayer to fight harder or longer. Since he gets no reimbursement award if he loses, he incurs the costs of the litigation. The essential victory is not the reimbursement of costs, but rather the victory of his position. He is not likely to fight harder or longer on the ground that the victory carries with it a collateral recovery. The harder he fights a losing case, the more it costs him.

It might discourage the pursuit by the Government of some cases; those, for example, where non-acquiescence is certain to be defeated in litigation. But if it is valid for the Government to pursue a case to certain defeat, it is even more vital that this particular taxpayer not bear the social burden of such "validity". A policy of reimbursement should not discourage proper litigation. And proper litigation need not be victorious litigation. Arguably the best government enforcement is that enforcement in which a substantial portion of its cases are lost. Too high a percentage of victory means that the enforcing officers take up only "safe" cases and leave too many marginal cases go by default to taxpayers. Arguably reimbursement might encourage the Government to pursue even more marginal cases because the Government need not have qualms that it is treating this taxpayer unfairly.

The effect of settlement is also not measurable. Perhaps it would encourage the Government more readily to settle some cases it is likely to lose because the Government has an additional cost. Taxpayers sometimes settle cases (particularly smaller ones) where they believe they are likely to win only a Pyrrhic victory. Reimbursement of a reasonable amount for fees might convert a Pyrrhic victory into a fair victory. If such a taxpayer should pursue his remedy more thoroughly than under our present system, the argument speaks well for the change. It establishes that our present system has an unjust element in it.

A new right would be recognized. In our legal structure, whenever a new right is recognized, some procedures must be established to give meaning to the right. The procedure might be set up administratively or might be under the rules of the Tax Court, or by a master sitting under authority of the Tax Court, or some other method. In whatever manner the procedure is set up, there is ample tradition in our legal system for measuring and awarding legal fees. Courts do so now in probate matters, in cases where there is a contract provision, in certain cases now set up by statute where fees are fixed by statute,[8] and in suits by lawyers against clients for fees.

---

6. Von Jhering, THE STRUGGLE FOR LAW, Chapter IV, *"The Assertion for One's Rights A Duty to Society"*, (published 1915).

7. 5 Am. Jur. §205, page 385, *Cirimele* v. *Shinazy*, 134 Cal. App. 2d 50, 285 (2d) 311 (1955). *Rogers* v. *Kemp Lumber Co.*, 18 N.M. 300, 137 P. 586, 51 L.R.A. (N.S.) 594, (1913). In the *Rogers* case the Court stated: "As between payee and his attorney, in the absence of a contract, express or implied, the attorney is not limited to the percentage stated in the note, nor does it measure his compensation."

8. California Probate Code, Section 910, California Labor Code, Section 3860.

BAR ACTIVITIES

James D. Bain

Zintsmaster

The 1959 Annual Meeting of the Minnesota State Bar Association was held in Minneapolis, June 17 through 19. Approximately 655 lawyers and 392 guests registered, making a total registration of 1,047. The newly elected officers are: James D. Bain, President; Philip Neville, Secretary; and Thomas C. Myers, Executive Secretary, all of Minneapolis.

The Tax Institute featured as discussion leaders the following: Winston E. Munson and Edward M. Arundel, of Minneapolis; George R. Johnson, Assistant Commissioner of Taxation of Minnesota, and Joseph J. LaRocco, Vice President and Trust Officer of the American National Bank of St. Paul.

An Institute on the Use of Demonstrative Evidence in Personal Injury Cases attracted a large group. Sponsored by the Junior Bar Section, the institute was conducted by James Jeans and John C. Shepherd, of St. Louis, Missouri.

C. Paul Jones, of Minneapolis, was elected Chairman of the Junior Bar Section; T. Eugene Thompson, of St. Paul, was named Vice Chairman; Secretary, John C. McNulty, of Minneapolis, and Richard A. Rohleder, of St. Paul, is the newly elected Treasurer.

Members of the Minnesota State Bar Foundation convened Wednesday for a business meeting and luncheon with President M. J. Galvin, of St. Paul, presiding. Mr. Galvin and Reuben G. Thoreen, of Stillwater, were re-elected President and Secretary-Treasurer respectively.

Presiding at the business sessions was President Luther M. Bang.

J. S. Nutt, First Secretary of the Canadian Embassy, Washington, D. C., delivered an address on "International Law—A Stock Taking" at the Thursday luncheon sponsored by the Junior Bar Section and the World Peace Through Law Committee. He said that even without the aid of an international police force, there is ample evidence that the role and rule of international law is growing. He pointed out that the breaking of a criminal law is more newsworthy than the thousands of cases where it is observed. The world gives greater notice to breach of international treaties than to their observance, he said. In conclusion he stated that nations have not yet nearly reached the stage at which they are prepared to accept the rule of law in all situations.

Allan H. McCoid, of the University of Minnesota Law School, and Stuart Rothman, Solicitor of Labor and recently appointed chief counsel of the National Labor Relations Board, were principal speakers at the institute of the Labor Law Section. Mr. Rothman predicted a growing attitude toward a spirit of responsible collective bargaining and industrial peace in the future.

Courtroom Photography—Canon 35—was the subject of the third annual Criminal Law Institute. Sponsored jointly by the State Bar Association's Criminal Law Committee and the Junior Bar Section, the Institute featured Howard W. Mithun, general counsel, and Paul Swensson, managing editor, of the *Minneapolis Star and Tribune*. A question and answer period followed their presentation relating to the arguments for and against the use of photography in the actual courtroom.

The President of the American Bar Association addressed an overflow audience at the Association's Friday luncheon sponsored by the Section of Real Property Law. Ross L. Malone, Roswell, New Mexico, in his address on "Professional Responsibility—Our Constant Challenge", called upon the legal profession to help cut down the number of lawsuits jamming the nation's courts. He said that the average time needed to dispose of a personal injury case in the Superior Court of Cook County, Illinois, is 57 months. In New York City it is 38 months. "Court congestion", he said, "has assumed proportions which cause it to strike at the very core of the professional responsibility of the Bar."

A social highlight was the annual banquet Thursday evening. President Bang paid special tribute to the 55 senior counselors present and each was tendered a certificate "in recognition of more than fifty years of honorable service at the Bar of Minnesota". Certificates were also given to Earl R. Anderson in recognition of eight years of service to the Association as its Treasurer; to William G. Kohlan, for ten years of service as membership chairman; and to Wayne Davies, on behalf of West Publishing Company, for aid to the profession through publishing.

Franklin Longan

The Montana Bar Association held its Seventy-First Annual Meeting at Great Falls on June 18, 19 and 20.

During the recent session of the Montana Legislative Assembly, enabling legislation for the adoption of "The Rules of Civil Procedure" was enacted and many of the lawyers who have not been familiar with the Rules were interested in a panel discussion on this subject. The members of the panel were Alfred P. Murrah, Judge of the United States Court of Appeals, Tenth Circuit, Oklahoma City; W. W. Lessley, Judge of the Eighteenth Judicial District of the State of Montana, Bozeman; Professor David R. Mason, School of Law, Montana State University, member of the Montana Civil

Rules Committee; and A. G. Shone, also a member of the Montana Civil Rules Committee, Butte.

A subject of real interest in Montana is "Income Tax Exemption of Co-ops", which was discussed by Roswell Magill, former Under Secretary of the Treasury and now President of the Tax Foundation, New York; and Charles F. Brannan, former Secretary of Agriculture, General Counsel of the National Farmers Union, with an opportunity extended to those present to question both speakers. This subject was of so much interest to the general public that several hundred non-lawyers attended.

Dean Russell D. Niles, New York University School of Law, delivered an excellent address on "What Can We Learn from English Lawyers and American Doctors" having for its theme the question of specialization in the practice of law.

Other speakers for the meeting were John D. Randall, of Cedar Rapids, Iowa, President-Nominee of the American Bar Association, and James T. Finlen, former President of the Montana Bar Association and former Montana Bar Association delegate to the House of Delegates of the American Bar Association.

The new officers of the Association are Franklin Longan, of Billings, President, succeeding Emmett C. Angland, of Great Falls; and John M. Detriech, of Billings, Secretary, succeeding John H. Kuenning, of Great Falls. Katherine Orchard, Executive Secretary, of Helena, continues in office.

New Hampshire professional organizations meeting (left to right) Edwin J. Holman, of Chicago, legal staff of the American Medical Association; Dr. Clinton R. Mullins, of Concord, President of the New Hampshire Medical Society; John F. Beamis, of Somersworth, President of the New Hampshire Bar Association; and Dr. Elwood F. MacRury, of Manchester, President of the New Hampshire Dental Society.

New Hampshire may become the first state in the nation to adopt an interprofessional code involving physicians, lawyers and dentists.

Following closely on the heels of the first tri-profession meeting in the state's history, the state societies have each named three members to special committees to draw up codes.

Expected to be modeled on those adopted last year by the American Medical Association and the American Bar Association, the codes will be similar to the thirty or more already in effect on a local basis. Details of the codes were presented to an assembly of professional men by Edwin J. Holman, of Chicago, of the legal staff of the American Medical Association.

Members of the New Hampshire Dental Society assigned to the code committee by Dr. Elwood F. MacRury, of Manchester, Society President, are: Drs. Harold Copeland, of Rochester, William Stuart, of Claremont and Thomas Gallagher, of Concord.

Appointed by John F. Beamis, of Somersworth, President of the New Hampshire Bar Association, were: Joseph Millimet, of Manchester; Robert Johnson, of Laconia; and George Cofran, of Concord.

Dr. Clinton R. Mullins, of Concord, President of the New Hampshire Medical Society, has named: Drs. Howard P. Sawyer, of Sanbornville; James W. Jameson, of Concord; and George A. Lord, of Hanover.

A theme of "speed, space and the family lawyer" prevailed at the 77th Annual Meeting of the Texas State Bar in Dallas, July 1-4. The four-day meeting, featuring "something special for every Texas lawyer", attracted more than 3,500.

A. J. Folley, Amarillo attorney and former associate justice of the Texas Supreme Court, became president of the organization which is expected to exceed 14,000 members by the year's end. He succeeded President Leo Brewster, of Fort Worth, who presided over general assembly sessions and the annual banquet.

Other new officers of the Texas Bar include John B. Daniel, Jr., of Temple, Vice President; and Paul Carrington, of Dallas, President-Elect. Mr. Brewster and Mr. Carrington are members of the American Bar Association's House of Delegates. Homer E. Dean, Jr., of Alice, was elected chairman of the board of directors.

The speakers included Ross L. Malone, of Roswell, N. M., President of the American Bar Association, who addressed the opening general assembly on "Professional Responsibility and the Bar". Dr. Wernher von Braun, international missile and space authority, was the Annual Banquet speaker on "How Big Is Space?" The German-

A. J. Folley

educated scientist, responsible for blasting the first U. S. satellite into space, was introduced by U. S. Senate Majority Leader Lyndon B. Johnson, Texas, Chairman of the Senate Committee on Space and Aeronautical Science.

Opening-day activities featured simultaneous legal institutes on: "Using Tax Knowledge in Daily Practice" and "Practice Techniques for the Younger Lawyer".

In the moot court competition sponsored by the State Junior Bar of Texas, the University of Texas Law School won over Southern Methodist University Law School. Judges were members of the Texas Supreme Court.

Section luncheons and meetings included these out-of-state speakers and topics: Associate Justice George Edwards, of the Michigan Supreme Court, "Society's Stake in the Criminal's Sentence"; Chief Counsel Robert F. Kennedy, U. S. Senate Select Committee on Improper Activities in the Labor or Management Field, "Racketeering in Labor-Management Relations"; Judge George W. Latimer, U. S. Court of Military Appeals, "Military Law and Its Challenge to Civilian Practitioners"; Chief Judge Emory H. Niles, Supreme Bench of Baltimore City, "Some Bad Judges"; and Assistant Commissioner Maurice A. Crews, U. S. Patent Office, "Uses of the U. S. Patent System for Stimulation of Invention".

Other organizations, which held luncheon and business sessions were the Texas Association of Plaintiffs Attorneys, Texas Civil Judicial Council and the Texas City Attorneys Association.

Among resolutions adopted at the final general assembly, the State Bar of Texas condemned a U. S. Senate resolution seeking to force the United States to become part of a world-wide court. Calling the proposed world tribunal "unwise, un-American and extremely dangerous to posterity as well as American citizens now living", the resolution said it would:

1. Seriously impair the sovereignty of the United States and the states composing it;

2. Effectively vest the power to amend the Constitution in a tribunal essentially foreign, not necessarily competent and possibly dominated by our enemies; and

3. Dangerously weaken and impair the ability of the United States to defend itself against aggressors.

Newell Edenfield

The Seventy-sixth Annual Meeting of the Georgia Bar Association was held June 17, 18 and 19 in Savannah with President Robert M. Heard, of Elberton, presiding.

John C. Shepherd and James W. Jeans, of St. Louis, presented a program on the use of demonstrative evidence in the trial of personal injury cases, under the sponsorship of the Younger Lawyers Section.

Among the speakers at other sessions were President Ross L. Malone of the American Bar Association, who addressed a luncheon session, and James F. Byrnes, of Columbia, South Carolina, who was the principal speaker at the Annual Banquet.

The following officers will serve during 1959-1960: Newell Edenfield, of Atlanta, President; John B. Miller, of Savannah, Vice President; Maurice C. Thomas, of Macon, Secretary; and J. Wilson Parker, of Atlanta, Treasurer.

The Annual Meeting of the Bar Association of the State of New Hampshire was held at Rye Beach on June 26 and 27. President John F. Beamis, of Somersworth, presided.

Francis E. Perkins

Approximately seventy-five members attended the discussions at the first session on "Abolishment of the Jury System-Commission Hearings", by Arthur A. Greene, Jr., of Manchester; "The Role of Corporate Fiduciaries", by Arthur H. Nighswander, of Laconia; "Accounting and the Practice of Law", by James A. Shanahan, Jr., of Laconia; and "The Impartial Medical Expert", by N. Michael Plaut, of Keene, and John H. Sanders, of Concord.

Stanley M. Burns discussed the preparation and presentation of both plaintiff's and defendant's cases at the second session, and Thomas F. Lambert, Editor-in-Chief of *NACCA Law Journal* gave an interesting talk on "Land Marks and New Directions in Torts".

Robert W. Upton, of Concord, Chairman of the Judicial Council, presented an oral report in which he commented favorably on the Uniform Commercial Code. He also reported on the work of the Judicial Council referring particularly to the proposed legislation in the field of probate law.

The Nominating Committee reported the following slate of officers for the ensuing year: President, Francis E. Perkins; Vice President, Fortunat E. Normandin; and Secretary-Treasurer, Willoughby A. Colby.

Highlighting the Fifty-Ninth Annual Meeting of the State Bar Association of North Dakota, held at Fargo, June 25 and 26, was the appearance of Ross L. Malone, President of the American Bar Association. Mr. Malone addressed the membership at a noon luncheon on Friday, June 26, and again at the Annual Banquet that evening. His remarks at both occasions were pertinent and well received. More than 50 per

Roy A. Ilvedson

A. C. Miller

cent of the total membership of the Association registered for this Annual Meeting.

A symposium on evidence, entitled "Presenting Evidence in Court", was presented by Martin A. Nelson, Associate Justice of the Supreme Court of Minnesota, William H. DeParcq and Arthur B. Geer, both of Minneapolis. The field of evidence was well covered in the six-hour presentation.

There were two sectional meetings, one on the subject of "Bankruptcy" presented by Charles M. Pollock and George A. Soule, of Fargo, and one on "New Legislation" presented by C. Emerson Murray, of Bismarck, Senator Ralph J. Erickstad, Senator Adam Gefreh, Joe Donahue and Kenneth Jakes, of Bismarck. Both meetings were well attended.

Officers elected for 1959-1960 were as follows: President, Roy A. Ilvedson, of Minot; Vice President, T. L. Degnan, of Grand Forks; Secretary-Treasurer, George T. Dynes, of Dickinson; and Executive Director, Lynn G. Grimson, of Grafton.

The Twenty-Eighth Annual Meeting of The State Bar of South Dakota was held in the historic City of Deadwood located in the beautiful Black Hills of South Dakota on June 26 and 27.

On the preceding day a Legal Institute covering insurance problems that confront the lawyer was conducted. Appearing on the program for the Institute were Donald Clifford, of St. Paul; Norman E. Risjord, of Kansas City; Sidney P. Gislason, of New Ulm, Minnesota; and Sylvester C. Smith, Jr., of Newark, New Jersey. During the last hour Harry Arneson, of Fargo, North Dakota, presented a symposium on procedural matters pertaining to condemnation of real estate, with a demonstration on the evaluation of lands by expert witnesses.

Following a Past Presidents' Breakfast on June 26, the regular meeting was called to order by President Ellsworth E. Evans, of Sioux Falls. Vice President A. C. Miller responded to the address of welcome given by Francis Parker of the Lawrence County Bar Association. Then followed the election of Bar Commissioners as follows: Elmer Genar, Springfield; Samuel W. Masten, Canton; Gordon Gunderson, Clear Lake; Lawrence D. Carlson, Mitchell; Philo Hall, Aberdeen; William K. Sahr, Pierre; Martin P. Farrell, Hot Springs; Robert Driscoll, Lead; William S. Churchill, Huron; Francis E. Hohman, Leola; Harold Gunvordahl, Burke; Newell Krause, Lemmon; T. M. Bailey, Jr., Sioux Falls; J. J. Eisenmenger, Milbank, and Don Porter, Chamberlain.

Addresses were given by Sidney P. Gislason, of New Ulm, Minnesota, President, International Academy of Trial Lawyers; John W. Delehant, United States District Court, of Omaha, on "Stray Thoughts on Federal Practice—1959"; Norman E. Risjord, of Kansas City, General Counsel of the Employers Reinsurance Corporation; and Sylvester C. Smith, Jr., Chairman of the House of Delegates of the American Bar Association.

A panel discussion of the newly enacted "South Dakota Drivers License Law" was conducted by the following members of the Junior Bar: Donald R. Shultz, Rapid City; Larry M. Hamblin, Belle Fourche; Dale Morman, Sturgis; and Marshall Gerken, of Pierre.

One of the highlights of the program was the presentation to its fifty-year veterans in the practice of suitable emblems and certificates acknowledging long service. Members receiving awards were Edward D. Barron, of Pierre; Ezra Baker, of Aberdeen; William H. Glynn, of Parkston; Judge Vernon R. Sickel, of Pierre; Judge C. N. Hall, of Huron; Judge B. B. McClaskey, of Huron; Earl R. Slifer, of Chamberlain; William M. Potts, of Mobridge; Karl Goldsmith, of Pierre; Harry Wilmsen, of Pierre; James R. McGee, of Salem; James O. Berdahl, of Sioux Falls; Clarence E. Talbott, of Winner; and Claude Maule, of Winner.

The closing address on the program was delivered by American Bar Association President Ross L. Malone, of Roswell, New Mexico.

A. C. Miller, twice speaker of the State House of Representatives and former Lieutenant Governor, was elected President of The State Bar for the ensuing year.

The meeting was concluded by a banquet presided over by the newly elected President. Dr. Marcus Bach, head of the Department of Religion at the University of Iowa, was the banquet speaker.

Erby L. Jenkins

Erby L. Jenkins, of Knoxville, became the new President of the Tennessee Bar Association at its Seventy-Eighth Annual Meeting in Nashville, June 11-13. Other officers installed with Mr. Jenkins are William P. Moss, President-Elect, of Jackson, and Charles C. Trabue, Jr., Nashville, Charles W. Miles III, Union City, Alfred W. Taylor, Johnson City, Vice Presidents. J. Victor Barr, Jr., of Nashville, was re-elected Secretary-Treasurer, and John C. Sandidge, also of Nashville, was re-elected Executive Secretary.

During the three-day session the eight Sections sponsored programs relating to specialized fields of law.

One of the principal events was the address given at the annual banquet by

the Ambassador of France to the United States, the Honorable Herve Alphand. Earlier that day the Chief Justice of Michigan, John R. Dethmers, spoke to the General Assembly regarding federal and state relationships. Sylvester C. Smith, Jr., Chairman of the House of Delegates of the American Bar Association, addressed a luncheon for the membership.

The Junior Bar Conference had for its guest speaker at its annual banquet, Kirk McAlpin, Chairman of the Junior Bar Conference of the American Bar Association. William T. Gamble, of Kingsport, was elected President of the Junior Bar Conference for the ensuing year.

Among the reports of committees were those of the Legislative and Legal Education Committees. The Legislative Committee pointed out that for the first time in several years the Tennessee Bar Association had a 100 per cent success in the passage of its legislative program. This included a Uniform Jury Commission Act, a Discovery Deposition Bill, a new Bill Decreasing the Time of Notice of Taking Depositions, and a Uniform General Sessions Court Bill, which replaced justice of the peace courts in eighty-seven of the ninety-five counties of Tennessee.

The Committee on Legal Education and Admission to the Bar recommended the establishment of a new committee on continuing legal education along the lines recommended at the Arden House Conference of the American Bar Association. This recommendation was accepted and the new committee will be headed by George W. Morton, Jr., of Knoxville. This committee has arranged for a legal institute to be held in Chattanooga on October 2.

Herbert L. Terwilliger

The Annual Meeting of the State Bar of Wisconsin was held on June 11 and 12, at Lake Lawn Lodge, Delavan, with more than 800 lawyers and their wives in attendance. The meeting was preceded by a session of the Board of Governors on June 10.

The two-day session was crowded with sectional meetings of a "bread and butter" nature, including meetings of the Insurance, Corporation and Business Law, Military Law, Taxation, Labor Law, Family Law, Real Property and Trust Law, and the House Counsel Sections. In addition, there were numerous committee meetings, a general assembly meeting, a Judicial Council forum to discuss the new court reorganization law, a legislative résumé and a law office economics forum.

High spots of the meeting were the address by American Bar Association President Ross L. Malone at the annual dinner on Thursday evening, the Insurance Section program on the problems of amount of damages in negligence actions, and the explanation of simplifying law office records and accounting methods by Kline D. Strong, of Salt Lake City, Utah, who described the Sans-Copywork system.

An action which attracted considerable interest was taken by the Assembly session, when the Assembly turned down further consideration of a proposal for a client security fund study in Wisconsin. A special committee had been studying the advisability of creating a client security fund and reported to the Assembly that it recommended further study.

The newly elected officers took office at the conclusion of the meeting as follows: Herbert L. Terwilliger, of Wausau, President; Carroll B. Callahan, Vice President; John Doar, of New Richmond, Treasurer; and Glen R. Campbell, of Janesville, Secretary.

Officers of the State Bar are elected by a mail ballot in May of each year on the basis of nominations submitted by a nominating committee or received by nominating petition.

Plans are already under way for an active program for the coming year. Of special importance was a joint conference between the chairmen of each committee and the Executive Committee of the Bar held on July 31 to review the projects and activities of each committee and to effect closer liaison between the committees and the Executive Committee.

On July 24 a joint meeting was held between representatives of the law schools and the local bar associations in Wisconsin conducting post-graduate education programs with the Committee on Post-Graduate Education of the State Bar. The purpose of the meeting was to work out greater coordination of effort between interested groups active in offering post-graduate training for lawyers. Such cooperation was urged in the report of the Arden House Conference.

What of "Permanent Peace"?

(Continued from page 920)

inevitably engender the admiration and unqualified approval of lawyers.

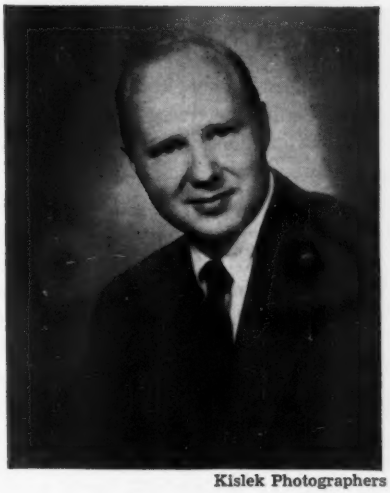
When an effective program embodying the elements to assure permanent peace shall have been found, he suggests that it be given full support, to the extent necessary, "by constitutional amendment" in the United States, "while approval of it is being secured in all of the other nations".

Although one wonders, again, just how the suggestion can be accomplished in Communist areas in which First Amendment freedoms are unknown, one must also applaud Tom Slick's hope that his book will give rise to further study and free discussion of its subject, "wherever people gather and exchange ideas".

Ultimately, he says, we "must apply our resources to living instead of dying", for "we can spare civilization the horrors of, or even perhaps extinction by, nuclear warfare"; and "we can at the same time achieve for all the world, under the conditions of permanent peace, a way of life infinitely better than has ever before been known in all of human history". Amen.

OUR YOUNGER LAWYERS

Elizabeth Elward, Washington, D.C., Editor;
Charlotte P. Murphy, Washington, D.C., Associate Editor



Kislek Photographers

Kirk McAlpin

The following report was submitted by JBC National Chairman Kirk McAlpin to the House of Delegates at the 1959 Annual Meeting of the Association in Miami, Florida. It is reprinted here because it gives a capsule account of the activities of the Junior Bar Conference during the 1958-59 year.

The Junior Bar Conference of the American Bar Association, with an average membership of 25,500 during 1958-59, enjoyed one of its most active years, with many tangible accomplishments. The year's aim for each major committee to set a goal which it would endeavor to reach before this meeting has been largely accomplished. Among our concrete achievements for this year are:

1. An intensified acceleration of our affiliation drive, resulting in the addition of many local units to the organization. Although this four-man committee has been in existence only a little over four months, it has communicated, by letters and personally, with every known unaffiliated junior bar local organization in the United States, as well as several unaffiliated state groups. The results have been more than gratifying. They have also been responsible for the publication of an *Affiliation Handbook*, setting forth the objectives, activities and affiliation procedure, including model resolution and petition for affiliation. Never before has there been such ready reference available for this purpose. This committee has also prepared and made ready for distribution an *Organizational Brochure* for state and local junior bar organizations.

2. Through its Membership Committee, the Junior Bar Conference has sponsored, both in spirit and by financial help, admission ceremony luncheons in many states this year, which have been of substantial help in increasing membership.

3. The Projects Committee has prepared and published a *Projects Handbook*, describing twenty-eight specific projects and programs which have been successfully undertaken by junior bar groups. This *Handbook* has long been needed and should be of material assistance to state and local junior bar organizations.

4. The coordination of all Conference publications has become a reality. Considerable financial saving has resulted. All printing is now done in Chicago, and where possible, at the American Bar Center. In addition to *The Young Lawyer*, which goes to the entire Conference membership, and the column "Our Younger Lawyers", appearing in the AMERICAN BAR ASSOCIATION JOURNAL, two new publications have appeared this year. The *Report to the Locals* was distributed immediately following the Los Angeles meeting and carried a résumé of that meeting as well as several suggested programs. There have been two issues of the *Junior Bar Bulletin*, one in connection with the Midyear Meeting in Chicago and another just prior to this meeting, encouraging submission of applications for the Award of Achievement, and carrying brief mention of junior bar projects around the country. These two latter publications are made available to state and local junior bar officers and are designed especially for their needs. The *1959 JBC Report* is an impressive review of the activities of the Conference, with much reader appeal engendered by its able editorship.

5. Educational seminars, both at the Midyear Meeting and at this meeting, represent an innovation which has met with an enthusiastic reception. At the Chicago meeting, three topics were treated by different speakers. Here other renowned attorneys have given us the benefit of stimulating talks and have participated in panel discussions which we feel had much to do with the tremendous interest manifested in our meeting.

6. The inauguration of a new Committee on Federal Legislation has proved its need far beyond our expectations. Working hand in hand with the Legal Aid Committee, it was responsible for spearheading interest in the optional legislation to provide compensation for attorneys representing indigent accused in Federal District Courts, or the appointment of public defenders. A representative group of young lawyers from various sections of the country appeared to testify in behalf of this legislation before a Subcommittee of the House Judiciary Committee in May, and over sixty replies from Federal District Judges who communicated with our Legal Aid Committee were made available to the Subcommittee. These committees also contacted many young lawyers throughout the country and obtained affidavits of personal experiences in court-appointed representations, some showing instances of ten and eleven weeks' rep-

resentation without compensation or reimbursement of expenses. These affidavits were made available to the Subcommittee. The Legislative Committee has also been actively supporting the Keogh Bill, along with other legislation of interest to the American Bar.

7. The effectiveness of the new Committee on Cooperation with Other Sections of the Association is best illustrated by the tremendous response from the Sections, indicating a desire to make a place for the younger lawyers. Personal contact was made at the midyear meeting between the Junior Bar and many chairmen and vice chairmen of these Sections, culminating in what we believe will be a much closer liaison. This committee also directed inquiries to over 18,000 young lawyers who were not members of any of the Association's Sections, urging that they join and participate. The Junior Bar hopes to continue to implement this program.

8. The Medico-Legal Committee has continued to foster programs in many of the state and local junior bar groups throughout the country. The chairman of this committee, as well as several of its members, has appeared on numerous panels. The popular appeal of these programs continues.

9. Our efforts with the military have been most rewarding. The chairman of this committee and others have appeared by invitation of the commanding officer at each of the classes of the Judge Advocate General's School, and have given short talks on the purposes of the Junior Bar. The high percentage of Association memberships from the JAG School is evidence of the contribution being made by this committee.

10. In the field of Public Relations, one of our proudest accomplishments has been the inception of a joint program with the United States Junior Chamber of Commerce (Jaycees) in the co-sponsorship of Law Day. This program received national recognition, emanating personally from the president of the United States Junior Chamber of Commerce to over 3,700 local chapters. The Law Day brochure made available by the American Bar Association was distributed with a joint cover letter from the chairman of the Junior Bar Conference and the president of the Jaycees, urging every local Jaycee chapter to take cognizance of Law Day and arrange a celebration with appropriate observance.

11. One of our newest endeavors is the formation of a committee known as the Status of the Young Lawyer in Government. This committee is composed of members from nearly every department and branch of Government, primarily from the District of Columbia. They have met regularly and have concerned themselves with the problems and opportunities of Government service and placement possibilities.

12. In the field of economic improvement of the Bar, the Committee on Survey of Statutes and Rules Regulating Attorneys' Fees is currently conducting a survey throughout the country. Because of the voluminous amount of work involved, the effects of this survey will probably not be realized for another year, yet it should serve to make a valuable contribution to the organized Bar.

13. Work in the field of Traffic Courts and the Unauthorized Practice of Law continues to receive our enthusiastic support. Committees for both are working very closely with their counterparts in the American Bar Association. A coordinated program has been undertaken with the General Federation of Women's Clubs, the Standing Committee on Traffic Court Program of the American Bar Association, and the Traffic Courts Committee of the Junior Bar Conference. This is a continuation of the Visitor-Violator Program. The problems of unauthorized practice continue to harass us. Here our committee has devoted its attention to educational work, with panel appearances before local bars, as well as in the law schools. We are particularly proud of the tangible achievements of this committee, as evidenced by the publication of its report in the last issue of the *Unauthorized Practice News*.

14. Personal visits to many of the state and local groups have been considered of primary importance. Where possible, personal contact has been made to encourage participation in bar programs. Among the state bar meetings attended by the chairman, or, in a few instances, his representatives, have been those of Arkansas, California, Florida, Illinois, Iowa, Kentucky, Mississippi, New York, Pennsylvania, Tennessee and Texas. The chairman has also been a special guest of the Junior Bar Sections of the Canadian Bar and the Inter-American Bar at their annual meetings, having also attended both regional meetings in Portland and Pittsburgh. He also personally presented the various Junior Bar Awards of Achievement at appropriate ceremonies in Detroit, Fort Worth, Memphis, Milwaukee, St. Louis and Washington, D. C.

15. A revision in the working organization of the Junior Bar Conference, whereby each of the four national directors has functioned in an assigned area, personally handling major administrative decisions on: Annual Meeting Program; Budget; Cooperation with Other Sections of the American Bar Association and American Law Student Association; Publications; and Scope and Correlation. Several obsolete committees were discontinued, and new committees created where specific projects were envisioned.

16. A balanced budget, with no "carry over" charges, and including provision for costs of several annual meeting publications, which have ordinarily been charged to the succeeding year's appropriation.

The many facets of this year's program can be attributed to the energetic participation of many young lawyers and their enthusiastic attitude for the projects, goals and purposes of the American Bar. Space does not permit personal mention nor elaboration of their many untiring efforts, culminating in these achievements. Yet to them go the thanks and appreciation of the Junior Bar Conference.

A more detailed account of J.B.C. activities during the 1958-59 Conference year is published in the 1959 J.B.C. Report. *Copies may be obtained from J.B.C. headquarters in the American Bar Center.*

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

GERRYMANDER: On my first visit to Charlottesville, Virginia, in 1935, I made the mistake of playing golf at the beautiful Farmington Country Club with the then Washington correspondent of the *London Times*. As naïvely, as when an attractive girl once told me I was "asinine" and I repeated it, thinking it a compliment, I inquired from my golfing partner whether the *London Times* was as good as the *New York Times*? I don't need to tell you the golf game stopped still, while, with gestures, I was given a never-to-be-forgotten lecture about *The Times*. As I recall it, even the weather report in that paper is checked. As the Blighter described it:

> At half past midnight, there appears in the office of the *Times*, the leading weather professor in London [Member of the Royal Astronomical Society, Knight of the Garter, *et al.*]. He comes in tails with ascot tie, bat-wing collar, spats, and a high hat, wearing gloves and carrying a cane. He reads and approves the daily *Times* weather report, then departs as dignified and stately as he came.

Were I to golf again with that fellow, I would match his weather professor with Anthony Lewis who reports the doings of the Supreme Court of the United States for the *New York Times*. While Tony Lewis does not dress like Lucius Beebe or that London "Prof", he is young (the *Harvard Record* of November 13, 1958, says he's 31) and attractive looking, but what's more important, he has been giving to America day by day the most lucid, interesting, intelligent and accurate reporting with respect to the Court that the country has ever known.

I frequently find myself doing what my friend Fitch Stephens used to do with the *Herald-Tribune*. Hating Walter Lippman, Fitch (who received the *Chicago Tribune*, daily and Sunday, by mail) would not buy the paper but when he bought the *New York Daily News* at the Blind Man's newsstand in the Ithaca Post Office he would peak at Thornton Burgess' "Peter Rabbit", then put Lippman and the *Herald-Tribune* back. With that broad-minded interest for which we lawyers are notorious, I find myself at the Schrot-Nash Newsstand at F and 15th St., N. W., doing the same thing with Tony Lewis' pieces in the *New York Times*. For lawyers he is a godsend and compulsory reading.

It is interesting to know that the *New York Times* acquired Anthony Lewis for this express purpose. After graduation from Harvard College in 1948, Lewis went with the *New York Times*, leaving in 1952 to join the Washington, D. C., *News* of the Scripps-Howard chain. There, in 1955, he won the Heywood Broun Award of the Newspaper Guild and the Pulitzer Prize for a story exposing an unjust security risk firing. In 1955, the *Times* hired him back to report the Supreme Court. To prepare for his assignment, Lewis became a Nieman Fellow at Harvard Law School during the academic year 1956-1957, taking courses in constitutional law, civil procedure and federal courts.

The wisdom of the *Times* in doing this was forcibly brought to my attention by Miss Eileen Shanahan who used to report the Supreme Court for the *Journal of Commerce*. As Eileen explained the problem, receiving between one and two P.M. of a Monday afternoon opinions as fat and complicated as, say the *du Pont-General Motors* case, and be expected to write an intelligent story for the Tuesday morning paper asks too much of the Fourth Estate. In vain, did she ask to receive the opinions at 8:00 A.M. and be locked in a room with them until the release time of the afternoon. The *Times* has met the problem by training Lewis for the "beat", but few papers can afford this. Eileen still has a point.

During his year at Harvard, Lewis did a study in the constitutional litigation seminar of Professor Paul Freund on Gerrymander that was published in the *Harvard Law Review* (Volume 71, No. 6, April, 1958, pages 1057-1098) under the title, "Legislative Apportionment and the Federal Courts". (Gannett House, Cambridge, Mass., $1.50 per copy.) It is the best I have read since Tabor wrote in 16 *Maryland Law Review* 277.

Lewis contends that only Supreme Court action will ever correct the Gerrymander, the evils of which are many and real. As H. L. Mencken once said: "The vote of a malarious peasant on the lower Eastern Shore counts as much as the votes of twelve Baltimoreans" (page 1057). Hartford, Connecticut, population 177,000, has two representatives, but so does Colebrook, population 592. One congressional district in Brooklyn was made "to worm its way through the few G.O.P. areas of the borough" (pages 1059-60).

After the decision in *Colegrove* v. *Green*, 328 U. S. 549, where Mr. Justice Frankfurter wrote, "Courts ought not to enter the political thicket", Illinois revised its congressional districts "for the first time in over forty years" (page 1088). It is "more than a coincidence" that "the first reapportionment in fifty years" came to Hawaii after the decision in *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220. More recently, the refusal of the Supreme Court, by a five-to-four vote, to review the legality of the county unit system of voting in Georgia has been followed by discussion in Georgia of legislative reform (*Hartsfield* v. *Sloan*, Mandamus Misc., Docket No. 683, June 16, 1958, 357 U. S. 916, and April 3, 1959, *N. Y.*

Times, page 15, column 4, Late City Edition).

Some twelve states, by constitutional amendment, have removed the responsibility for apportionment from the political branch (page 1089). "Americans have traditionally looked to the courts for moral values, as they have tended to think politically in terms of moral judgments. Whatever their merits, these are our traditions." Accordingly, Mr. Lewis believes that, "Only by putting them to use, with the help of the federal courts, can we begin to solve the problem of unequal representation" (page 1098).

Quite a piece. And if Mr. Lewis is right, the next great crisis for the Court will be the Gerrymander, which will cause country folk to attack the Court and city slickers to defend it.

LIBRARY OF THE SUPREME COURT: The *Federal Bar Journal* has a new format and is this year a very improved periodical. In its April, 1959, issue (Vol. 19, No. 2, pages 185-199; $1.50; 1737 H St., N.W., Washington 1, D. C.) an Assistant Law Librarian at the Library of the Supreme Court of the United States, Edward G. Hudon, who is the author of two fine articles in *The Insurance Law Journal* ("Two Maine Statutes Affecting Insurance Agents", May, 1957, No. 412, pages 263-272, and "Insuring and Exclusion Clauses in Individual Accident and Health Policies", March, 1958, No. 422, pages 135-153. Subscription $10 per year or $1.00 per copy; 4025 West Peterson Avenue, Chicago 46, Illinois), and a very able and helpful law librarian, writes a very interesting piece entitled, "The Supreme Court of the United States: A History of Its Books and Libraries".

Reading Mr. Hudon's article, one is struck by the neglect of the legal profession for its libraries. The Supreme Court began in New York in 1790 without a library. In 1812 the Court was still without a library, but that year the Judges were allowed to use the books in the Library of Congress "on the same terms" as Congressmen. However, in 1814 the British burned the books and Thomas Jefferson came to the rescue by selling his library to Congress. In 1832 the law books in the Library of Congress were segregated and a law library under the control of the Court established in the Capitol. Chief Justice Marshall and Associate Justice Story then had power to direct library selections. Eventually, the Supreme Court Library became located immediately under the old Supreme Court Room in the Capitol.

There are three divisions of the Supreme Court Library: (1) The "Judges' Sets", collections assigned for the personal use of each Justice, which date from the time prior to the erection of the Supreme Court building when the Justices had their offices in their homes; (2) the Elbridge T. Gerry collection presented to the Court by Peter G. Gerry about 1928 which forms the nucleus of the collection on the second floor of the Supreme Court building for the use of the Court; and, (3) the collection in the reading room on the third floor of the building open for the use of members of the Supreme Court Bar.

Appropriations have not been too generous and without Thomas Jefferson and Peter Gerry, one shudders to think what the Supreme Court Library would be today.

Elbridge T. Gerry, of course, was the grandson of the "Signer", well remembered for "Gerrymander". After his father's death, Peter Gerry gave his magnificent law library to the Court. Among priceless English and American law books, Gerry's collection included papers of the American Society for the Prevention of Cruelty to Animals, to which he was legal adviser, and the New York Society for the Prevention of Cruelty to Children, of which he was the founder. Gerry's collection also contained pamphlets on corporal punishment, books on medical jurisprudence and several hundred books on church history, particularly on the Protestant Episcopal Church. And last, but not least, a handwritten menu book of the meals served the Gerry family from November 18, 1918, to May 8, 1919.

The annual book fund of the Law Library of Congress is now about $90,000, the Supreme Court Library book fund $30,000, and the library numbers about 190,000 volumes. It has had four librarians, the office having been first created in 1887, namely, Henry De Forest Clarke, Frank Key Green, Oscar De Forest Clarke (son of Henry) and the present librarian, the able and distinguished Miss Helen Newman.

Mr. Hudon tells us that down through the years Congress has been both stingy and generous so that great gaps still remain in the library.

> To cite but one, there are the *Statutes of Realm*, a set the library would like to acquire but the cost of which is somewhat prohibitive.

Hopefully, Mr. Hudon concludes:

> But then, perhaps some day a second Peter Gerry will come forth and complete the work which the first one so effectively began.

Let's hope so. A splendid study of one of the finest law libraries in the world by an able and devoted Law Librarian.

MILITARY JUSTICE: There is an excellent note by Tom Brown of Duke in its *Law Journal* (Vol. 1959, Summer, No. 3, pages 470-475; $1.50; Durham, North Carolina) with respect to *United States* v. *Kraskonkas*, 9 U. S. C.M.A. 607, where by a two-to-one vote the Court of Military Appeals "held that military counsel selected by the accused in a General Court Martial may not be a nonlawyer" (page 471).

SENATOR LANGER: I regret that this Department in the July issue stated that Senator Langer delayed the nomination of Chief Justice Warren because, as a matter of principle, he does not want to vote for any nomination to the Supreme Court of the United States until some good lawyer from North Dakota is given the job. I am told this was the Senator's attitude with respect to Ambassadors. However, after President Truman appointed Thomas E. Whelan, of North Dakota, Ambassador to Nicaragua, and now that President Eisenhower has continued him in office, the Senator feels differently, even about Ambassadors.

In the case of Chief Justice Warren, however, Senator Langer, in two speeches to the Senate, February 19

and 26, 1954, 83d Congress, Second Session, 100 *Congressional Record* 2043 and 2358, explained the delay. The nomination came to the Senate on January 11, 1954, and the Chief Justice was confirmed on March 1, 1954, although the Chief Justice had been sitting on the Court under a recess appointment of October 5, 1953.

Except for Chief Justice John Rutledge, who failed of confirmation, and Benjamin Curtis, who deferred taking his seat until Congress came into session, no Supreme Court Justice ever has sat under a recess appointment until Chief Justice Warren, and Justices Brennan and Stewart did so in our time. Senators Johnston and Eastland filed a minority report on the nomination of Justice Potter Stewart for this reason (86th Congress, First Session, Executive Report No. 2) and the House Judiciary Committee of which Congressman Celler is Chairman had Cyril F. Brickfield of his staff and Louis Loeb of the Library of Congress recently do a valuable study with respect to recess appointments of all federal judges (86th Congress, First Session). The Document Room of the House and Senate will send these to you free, or you can write your Senator or Congressman for them.

In his speech to the Senate on February 26, 1954, Senator Langer stated that 197 complaints against the nomination of Chief Justice Warren had been received. At his direction Messrs. Sourwine and Smithey of the staff of the Judiciary Committee reduced to a list of about ten, which, if true, went to the fitness of the nominee to hold office. The staff was not charged with, nor did it undertake, the task of verifying the complaints.

One complaint was by Roderick J. Wilson, of Los Angeles, sent to the Committee by Burr McCloskey. After the public hearing began, Deputy Attorney General Rogers told Senator Langer that Wilson was a "fugitive from justice" and said, "Certainly we are not going to hear a man who is a fugitive from justice" (page 2360). But the Subcommittee voted to hear Wilson, and when Wilson, with McCloskey, appeared at Senator Langer's office, the Senator had two Capitol policemen present to arrest him. Senator Langer then wired the Deputy Attorney General and told him the Capitol police had his man and he could come and get him. The Attorney General's office had "someone in California" telegraph a warrant to Washington.

After Wilson testified, the full Committee voted on the Warren nomination and he was confirmed by a vote of twelve to three. Senator Langer was one of the twelve who voted for confirmation (page 2361).

Apparently a factor in Senator Langer's deciding to hold a hearing on the Warren nomination was due in large measure to two things. First, the Chief Justice refused to appear before the Subcommittee, and second, the Attorney General "took the position that no Chief Justice ever had been investigated by the FBI" (page 2360). Both displeased Senator Langer because he said, "All the New Deal appointees to the Supreme Court from Senator Black to Attorney General Murphy had been present at hearings of the Committee on the Judiciary and had been available for examination, had any Senator desired to ask questions." Actually, Senator Langer says, "Mr. Justice Frankfurter was the only one who was actually examined."

Although Chief Justice Vinson was exempted from an F.B.I. report, Senator Langer states he was examined by the committee. Senator Langer said that it was only after he wrote the Attorney General at the committee's direction that an F.B.I. report was supplied. However, it was not one based on a full field examination.

In retrospect, Senator Langer did not delay the confirmation of Chief Justice Warren very long. Senator Langer received the nomination on January 11, 1954, and Warren was confirmed on March 1—a delay of about one month and seventeen days. The Senate received the nomination of Justice Harlan on January 10, 1955, and confirmed him on March 16. This was a delay of two months and six days. The nomination of Justice Brennan was received on January 14, 1957, and the Senate confirmed him on March 19—a delay of two months and five days. In the case of Potter Stewart, his name went to the Senate on January 17, 1959, and he was confirmed on May 5, 1959—a delay of three months and eighteen days.

Further, in fairness to my good friend Senator Langer and Mrs. Irene Edwards, his able Administrative Assistant, and her lovely family, let me say that, while the Senator voted against Mr. Justice John Harlan (on March 16, 1955), he voted in favor of Justices Minton on October 4, 1949, and Stewart on May 5, 1959. These are the only Justices of the Supreme Court upon which the Senate has had a roll call vote. The votes in Committee were in Executive Session and are not made public. My information as to Senator Langer's vote on the Warren nomination comes from his Senate speech.

All I can say is that, like the "Little Flower" (Fiorello LaGuardia) who made the remark about a magistrate he had appointed, "Whenever I make a mistake it's a beaut." My apologies to Senator Langer.

(Continued from page 977)

quite easy to study the effect of different kinds of sanctions and different degrees of severity in a given sanction (e.g., size of fine) by examining systematically the behavioral conformity and the extent of prosecution in the various states which have these different sanctions against the same given category of crime. It is an evidence of the sociologist's blindness to the importance of law that he has not made use of this great natural laboratory for understanding human behavior under social influence and social direction. While a few significant studies have been done on nonconformity,[7] the possibilities of such study have not yet been systematically exploited by sociologists.

7. Particularly to be noted are studies in the area of violation of price and rent control legislation: Marshall B. Clinard, THE BLACK MARKET (New York: Rinehart and Company, 1952); Harry V. Ball, "A Sociological Study of Rent Control and Rent Control Violations, Unpublished Ph.D. thesis, University of Minnesota, 1955.

The Role of the Supreme Court

(Continued from page 914)

interests of the individual. Again in this sense the Court is a working part of the system, in my view a necessary part.

Finally, any supporter of judicial review *must* argue that the process of decision in the Supreme Court has advantages over the process in the political branches. The basic difference was pointed out in this year's Holmes Lecture by Professor Herbert Wechsler: A court must support its decisions by a reasoned, principled, explanation of a kind no legislature or executive is obliged to give. Another element on which I think most observers would agree is that the opposing considerations are more likely to emerge in intellectual focus in the judicial process. Even a mediocre Supreme Court argument gets closer to the point in an hour, I can say from experience, than a typical Senate debate does in days. Or than does a Senate committee hearing on the confirmation of a Supreme Court justice. The Court can bring to difficult issues greater detachment, more concentrated consideration and—not the least important for a country weak in tradition—a special sense of history.

Now the critics would quickly say that those are fine ideals but the Supreme Court does not live up to them. My first reaction is that I wish some of the critics would tend to the beam in their own eye before attacking the mote in the Court's. The state chief justices, for example. I should like to hear a debate on judicial tyranny between some Supreme Court Justices and the Supreme Court of my own state, which recently invalidated two-acre zoning in my neighborhood on the ground, as I understand the opinion, that farmers have a constitutional right to profit from the advancing suburbs. More seriously, what can be said for the intellectual honesty of a state court system which has kept the N.A.A.C.P. out of business in that state for three years with a "temporary restraining order" despite a Supreme Court reversal of the case almost a year ago?

I recognize the deficiencies in the work of the Supreme Court today as well as most observers, I think. I know its shortcomings in opinion-writing, its unnecessary divisiveness, its occasional lapses from detachment. My point is only that those failures by the farthest stretch of the imagination cannot justify the attacks made on the Court and on its role in our system. How would the performance of Congress or the President or most state legislatures stand up in comparison if subjected to equally tough scrutiny?

I urge the duty to understand the Court, to offer intellectual criticism when justified but to support the Court against attack by those who do not take the trouble to understand.

Especially these days, I believe, do lawyers owe that duty. In the past the Court had a constituency of supporters in the business and financial community, among the influential conservative leaders of our society, because their interests coincided with the trend of decisions. That conservative support stood by the Court in past crises. The interests which I have said are most prominently receiving the Court's protection today—fair procedure, free speech, racial equality—have no powerful constituency automatically behind them. Indeed, decisions protecting those interests have disaffected important groups in our country. But lawyers must know, and so surely have the duty to explain, that the freedom of all of us depends in some measure on the assurance that the Supreme Court of the United States will continue to exercise its properly important role in government.

The True Shakespeare

(Continued from page 943)

of the Fair Youth's parentage.

One of Oxford's most candid, literal and detailed portrayals of the Lord Treasurer is in the character of Polonius, Chief Minister at the court of Denmark. (*Hamlet* is straight autobiography, with some of the revelations made in symbolic terms. The Ghost of his father is Vere—Truth—informing his son about what is "rotten in the state of" England; Horatio and Francisco are Oxford's cousins, Horatio and Francis Vere.) Cecil, an inveterate eavesdropper, set spies upon his own son and later upon his son-in-law, Oxford, when they travelled abroad, just as Polonius employs Reynaldo to spy upon Laertes. (Cecil was called "the Fox" at court.) Polonius eavesdrops twice upon Hamlet: first when he talks to Ophelia, again when he goes to "speak daggers" to the Queen.

When Polonius cries out from behind the arras, Hamlet, exclaiming, "How now! a rat?" stabs the old busybody with his rapier. After the fashion of Elizabethan drama, this was, in one sense, a symbolic death (it was so understood by the *cognoscenti* at court, although the play was of course "caviare to the general"): Hamlet is stabbing the intruder with his rapier wit.[7] So that when the King demands, "Now, Hamlet, where's Polonius?" he can reply with *sang-froid*, "At supper . . . Not where he eats, but where he is eaten: a certain *convocation* of *politic worms* are e'en at him. Your *worm* is your only *emperor* for *diet*."

This would have caused much merriment at court, with the Queen shouting with laughter. For the garrulous William Cecil (whom Elizabeth had created Lord Burghley in order that his daughter might make a *mariage de convenance* with the Earl of Oxford) had often been heard to say that he had been born during the session of the

7. In Much Ado About Nothing (V.1.125), Benedick says, "[My wit] is in my scabbard."

Diet of *Worms,* when Charles V was proclaimed *Emperor*: thus a "*convocation* of *politic worms.*" But there is a further allusion; for *Ver* is French for *worm,* and this Ver is dieting upon his victim, Burghley, who, as it happens has done him an irreparable wrong and is getting off lightly enough. Incidentally, it is well known that Polonius's precepts to Laertes paraphrase those given by Burghley to his own son.

(*Of course no common playwright could have dared caricature Lord Burghley. It was bold even for the Queen's favorite to do so*; for the portrayal of a living person recognizably on the stage was a Star Chamber offense.)

Polonius appeals to Gertrude:

> Tell him his pranks have been too broad to bear with,
> And that your Grace hath screen'd and stood between
> Much heat and him.

But Elizabeth continued to protect and encourage her dramatist. She knew his value.

"The great Lord Burghley", who was also represented in the characters of Shylock—"My daughter! O my ducats! O my daughter!"—of Capulet, bustling about to entertain his noble friends; of Pandarus, telling Cressida, "If my lord get a boy of you, you'll give him me"; of Cassius, the politic schemer; of Gonzalo, the old counsellor; and of others, partially or wholly —the ambitious Lord Burghley, consummate politician and arch Philistine, sanctimonious hypocrite and smooth contriver, had no intention of allowing the world to know that the dramatist was his son-in-law or the Queen's favorite either, for that matter. If he were believed to have been a common playwright blessed with a name similar to the pseudonym, writing twenty years later, near the turn of the century, all this would appear to be *fiction written in a vacuum.* (So it has indeed appeared to the Stratfordians, one of whom has attempted to transfer the allegation to Oxford, who was only using fiction—drawing upon his beloved "old tales"—to convey startling truths.) It should be noted that Oxford portrayed himself with as devastating candor as he did Burghley and the rest. Truth—Verity—was a fetish with him.

If he was Prince Hamlet, Bertram and Benedick—"a lord to a lord, a man to a man"—he was also, in his comedic aspect, Touchstone, "a fool . . . that hath been a courtier", and Feste, Olivia-Elizabeth's "allowed fool" and "corrupter of words". If he was King Lear (King Earl), "more sinn'd against than sinning", he was also partially Othello of the "sooty bosom". He was Valentine and Proteus, Two Gentlemen of Verona, one Ver; he was both Romeo and Mercutio, again Two Gentlemen of Ver-ona. He was even partially and symbolically Macbeth. And he was altogether the defeated Antony, who sacrificed life and honor for Cleopatra-Elizabeth, in the magnificent epic-drama of their love, in the end gratifying her "immortal longings" by making her and her era immortal in his works.

He was, to some extent, all of them. He dramatized the events and the great personages of the time. Catherine de Medici ("She-wolf of France") appears in several roles; so does Philip of Spain (after the French envoy Simier had seen *Titus Andronicus* he always referred to Philip as "Saturn", from Saturninus); the Duc d'Alençon and others. Elizabeth is portrayed in many aspects; so are Leicester, Hatton, Philip Sidney, Oxford's wife, Anne Cecil, and the Dark Lady, Anne Vavasor. *The Winter's Tale* in 1587-88 portrayed Mary Stuart as Hermione in the trial scene, even paraphrasing her own statement.[8] In the final version of *Coriolanus,* Essex and Southampton are combined in the character of the noble rebel. It is a moving and powerful history.

Oxford's family motto was *Vero Nihil Verius* —"*Nothing Truer than Truth,*" or "*Nothing Truer than Vere*". When he was in the grip of his demon —his *furor poeticus,* or what Hamlet called his "madness"—he had a godlike detachment, showing them as they all were: the good with the bad; the innocent with the sordid; pathos with brutality; wit and learning with hypocrisy and affectation; the noble with the cruel and bestial. While the truth was something both Elizabeth and Burghley twisted to their own purposes, it was with Oxford a compulsive value. But the Queen knew that she and her era were being made immortal, and so she decreed that the plays themselves must live, while Burghley saw to it that their author's name was denigrated and all but obliterated. Hence the "all oblivious enmity" of Sonnet 55. And hence Hamlet's plea to Horatio to clear his "wounded name":

8. The Winter's Tale: III.2.21 f.

Absent thee from felicity awhile,
And in this harsh world draw thy breath in pain
To tell my story.

III.

For five hundred years the Earls of Oxford had been official sword-bearers to the Monarch, and they had wielded their spears ceaselessly in martial combat for the glory of England. Edward de Vere, the 17th Earl, had expected to do likewise, but the Queen was shrewd enough to recognize and make more appropriate use of his genius. Not only was he the champion Spear-shaker to Her Majesty in the three great tournaments of his maturity, he was following her demands by shaking the spear of his wit—his rapier wit—in her service, using the *words* (which he thought of as his *sword*) in her defense and for her glory, while entertaining her and her court, the foreign ambassadors and visiting dignitaries with the brilliant dramas which so delighted the scholarly and pleasure-loving Elizabeth Tudor. Incidentally, Edward's boyhood crest as Viscount Bulbeck, before he came into the earldom, was a lion shaking a broken spear, symbol of a disabled enemy. Furthermore, Elizabeth and Oxford were joint patrons of the English theatre, as Pallas Athena had been of the Greek. Pallas's insignia had been her spear (she was the *hasti-vibrans*, or spear-shaker) and her helmet, which conveyed invisibility. The Queen sponsored Oxford's work, making him two grants to defray his heavy expenses, the second after he had spent almost his entire fortune in producing plays for her—his and those of his protégés—in London and in the provinces as well.

In 1578, in a Latin oration addressed to the Earl of Oxford, during the Queen's progress to Cambridge, Gabriel Harvey declaimed, "Thine eyes flash fire, thy countenance *shakes spears*." (Later he called the handsome, lively young Earl "the observed of all observers". Oxford used this phrase to describe Hamlet: it is one of the innumerable identity clues scattered throughout the plays.)

Surely "Shake-speare" was the inevitable choice of a pen-name for this Elizabethan with his insatiable zest for word-play.

IV.

Two outstanding descriptions of the man who was Shakespeare have come down to us: one by George Chapman, translator of Homer, written when Oxford was 25 years old, the other by Ben Jonson in his introductory poem in the First Folio (to be discussed later). Chapman wrote:

I overtook, coming from Italy
In Germany, a great and famous Earl
Of England, the most goodly fashion'd man
I ever saw: from head to foot in form
Rare and most absolute; he had a face
Like one of the most ancient, honour'd Romans,
From whence his noblest family was deriv'd;
He was besides of spirit passing great,
Valiant, and learn'd, and liberal as the sun,
Spoke and writ sweetly, or of learned subjects
Or of the discipline of public weals;
And 'twas the Earl of Oxford.

This is the kind of man Shakespeare's works show him to have been: noble and courtly, a feudal lord, high-minded and generous (but on occasion, vengeful); brave, learned and of liberal spirit; eloquent upon all subjects, including the welfare of the state.

Shakespeare manifests an easy familiarity with court life, its conventions and speech. This is never stilted; it is habitual and natural with him. He knows intimately the ways of lovely ladies and proud lords. He makes constant reference to the sports of the nobility, showing first-hand knowledge of jousting, hawking, horsemanship, fencing, with warfare and the sea. His preoccupation with honor is that of a feudal lord. (Walt Whitman observed that the chronicle plays were "conceived out of the fullest heat and pulse of feudalism", obviously written "by one of the wolfish earls or a born descendant and knower".) His indifference to money is evident (a fault Burghley and some historians could never forgive). Shakespeare reveals the experience of travel Oxford had had—of transportation in Italy in 1575, a first-hand knowledge of Venice, familiarity with great houses. He knows the contemporary Italian theatre. Shakespeare evinces a profound knowledge of law. That this has been assimilated and fixed in his consciousness is apparent from the spontaneity and ease with which he uses legal expressions and concepts in the sonnets. (Ben Jonson was able to string out a number of legal terms, showing off, after his usual fashion. Jonson was for a time in Bacon's employ as secretary—"one of my good pens", Bacon called him—and he had an agile mind. But Oxford was steeped in the law itself.) Oxford spent three years at Gray's Inn, and he was a life-member of the two most important Law Committees of Parliament, the presiding officer of one.

Edward de Vere had the background of culture from which such dramas as

Shakespeare's necessarily stemmed. Excellent playwrights as some of his contemporaries were, they were products of and expressed a different milieu. The poets Surrey and Sheffield were his uncles by marriage. He was tutored by the best scholars of the day, one of whom, Nowell, wrote his guardian when the precocious boy was 13 that his services would not be needed much longer; another was his uncle, Arthur Golding, translator of Ovid's *Metamorphoses*, in which Shakespeare's works are saturated. He received his A.B. degree from Cambridge at 14 and his M.A. from Oxford at 16. The Queen was present on both occasions. After his father's death, when he was 12 years of age, de Vere spent much time at court, where the learned Elizabeth fostered his genius, wrote poems with him and encouraged him to take charge of the Revels.[9]

Shakespeare based *Hamlet* on the *Oresteia* of Aeschylus and the *Elektra* of Sophocles and took suggestions for *Lear* from the *Prometheus Bound* long before these works were translated into English. He shows familiarity with the *Iliad* and the *Odyssey*. He knew Chaucer. The young Oxford owned Plutarch in French several years before it was translated by his friend North. Shakespeare's knowledge of the Latin classics was profound: he drew, as a modern scholar has noted, upon "a myriad" classical writers. An English lecturer said recently that "whoever the gentleman was who wrote the works of Shakespeare", he did not "interlard his text with great chunks of Latin, as Bacon, Jonson, Marlowe, Greene and all the rest" did, presumably to impress one another; he made copious use of the Latin works, but he "transmuted them into something new and—English".

Shakespeare (Oxford) was also steeped in the works of the Italian Renaissance writers—Ariosto, Castiglione, Bembo, Boccaccio, Guazzo—and shows too the influence of the French Ronsard and du Bellay. *Love's Labour's Lost* was patterned on the literature of the Italian Renaissance. It was first produced as *A Mask of Amazons and a Mask of Knights*, in 1578, at the height of the Euphuist fashion. Had it been written as late as it is placed in the Shakespeare canon, this play would have been an anachronism. It is because the plays appeared many years earlier than the commentators have realized, misled as they have been by the altered titles of later versions, by long-deferred publication (sometimes twenty or thirty years), and by false dates accruing to a supposedly later writer, that there has been so little understanding of the copious topical allusions with which they are informed. (Cairncross, the orthodox scholar, in *The Problem of Hamlet*, shows that Shakespeare's *Hamlet* was written before August, 1589, or even before August, 1588. He says that the entire chronological structure of the plays will have to be revised, that nine histories were written before Shaksper was 23, and *Pericles* was earlier.) This was the intention of the perpetrators of the hoax: to separate the true author from his works and thus prevent the general public from understanding the revelations he had made.

Edward de Vere (Shakespeare) was the creator of the English Renaissance; the other playwrights learned from and were supported by him. He is indeed the Star of England. (The mulleted star adorns the Vere coat-of-arms.)

V.

Shakespeare's vocabulary comprised (according to the latest estimate) 17,425 words, Milton's coming next with 8,000. He coined 5,000 words for the English language, many of these based upon Greek and Latin roots. (This would seem to dispose of the point so often stressed that Ben Jonson was more learned than Shakespeare. Jonson advertised his scholarship, Shakespeare took his for granted.)

VI.

At Castle Hedingham in Essex, when Edward was a child, his father, Lord John de Vere, maintained a company of actors. At Cambridge and Oxford the young Earl wrote and acted in plays, and so he did later at court. Feuillerat said he was *le meilleur acteur comique de son temps*. Hamlet instructing his players is Oxford training his and the Queen's actors at court. He rented the Blackfriars Theatre for a time, and he maintained three road-companies during the 1580's. In 1602 he combined his London company with that of Lord Worcester. (The Stratfordians take "Shakespeare's" company to mean Shaksper's, but the Stratford man had none; the cost of maintaining a company of actors was immense.) The reason there is no record of Henslowe's ever having made payment to Shakespeare, either as actor or as playwright, as he did to all the others of any consequence, is that the Lord Great Chamberlain of England accepted no money for his work. It is surely significant that the memoirs in two published volumes of the famous actor Alleyn which discuss the playwrights and actors of the time make no mention at all of Shakespeare.

Like Hamlet, Oxford was "lov'd of the distracted multitude". The Spanish

9. Katharine Eggar: *The Seventeenth Earl of Oxford as Musician, Poet and Controller of the Queen's Revels: Proceedings of the Musical Assn.*, Sixty-first Session, 1934-1935, Leeds.

Ambassador, Mendoza, wrote Philip in 1578, "He is a lad who has a great following in the country."

VII.

It is impossible within the scope of this outline to quote statements about the Queen's love for Oxford or the high praise given him by writers and musicians of the day, most of which material has been discovered through research among unfiled documents in the British Museum which escaped Burghley's censorship. Carefully filed among the Cecil papers are the iniquitous accusations made by Henry Howard and Charles Arundell, cornered traitors whose plot to assassinate the Queen Oxford had been compelled to expose. These outrageous and groundless charges have been preserved and are still quoted in biographies of Oxford in encyclopaedias. (He himself dismissed the whole affair with light ridicule in *Much Ado About Nothing*—or *Much Ado About O.*—combining this part with the "lost" play, *Love's Labour's Won.*)

A further instance of the adoption of the Cecilian version is A. L. Rowse's characterization of Oxford as "a light-headed young fop" who "ended with the mentality of a failed gambler". Burghley, who abhorred the theatre, called Oxford's playwright protégés—Lyly, Kyd, Dekker, Marlowe, etc.—his "lewd friends". Hence Rowse assumed he was dissolute. He apparently also believed the slanderous accusations against him preserved in the Cecil records. Not having known that Oxford was spending his money in the service of Her Majesty, Rowse assumed he was a spendthrift. In 1586, when England was threatened by attack from Spain, the Queen made Oxford a grant by Privy Seal Warrant of £1,000 a year ($40,000) to arouse the populace. He and the playwrights in his workshop poured out chronicle plays. When the lusty, though ignorant, people heard Henry's rousing cry, "Once more unto the breach, dear friends, once more!" they went wild with patriotism, volunteering in droves all over the country for service against Spain. Oxford and Elizabeth share the credit for England's greatness. Rowse assumes that this enormous grant was a merciful gift to an impecunious nobleman. He ought to know that Elizabeth never gave a shilling without value, and usually much more, received. So far as she was concerned, impecunious noblemen could rot. Thus historians follow William Cecil's authorized version regarding the England of Elizabeth and Shakespeare.

In 1598 Meres was commissioned to publicize the pseudonym in his *Palladis Tamia.* The plays were much in demand; someone was selling "stolne and surreptitious copies" to printers. Meres mentions Shakespeare in various categories. In an early one he also mentions Oxford's name as a dramatist. It would have been too suspicious if he had left him out entirely, for there were many who knew he had written plays for performance at court.

In 1622 Henry Peacham, Master of Arts at Cambridge, put Oxford's name at the top of the list of those who had made the reign of Queen Elizabeth "a golden Age . . . who honoured Poesie with their Pennes and practice". He did not mention Shakespeare.

Ben Jonson said of Shakespeare, "I lov'd the man and do honour his memory (on this side idolatry) as much as any." Yet he did not name Shakespeare (or Oxford either, for that was forbidden) in his list of the most distinguished writers of his time, nor did he address a single epigram to him, as he did to all the other great men with whom he was currying favor. (He did write an epigram about such a man as William Shaksper, entitled *Poet Ape.* And he dramatized Oxford and Shaksper in his first four satires.)

Sir George Buc wrote of the Earl of Oxford, "*Vere nobilis,* for he was truly noble . . .a most noble Vere."

Gervase Markham said, "I will speak only what all men's voices confirm: he was a man in mind and body absolutely accomplished with honourable virtues."

Queen Elizabeth spoke of his "good, true and faithful service", and referred to him in Parliament in the phrase "*ac charissimo consanguineo Edwardo Comitis Oxon', Magno Camerario Angliae*".

James I made him a member of the Privy Council.

Oxford's detractors have adhered to Cecil's line.

VIII.

The Victorian scholars and their followers, in viewing Shakespeare's clowns and comic scenes with a kindly tolerance for Elizabethan humor, have missed many vital points. In *As You Like It* (V.1), Touchstone (Shakespeare-Oxford) encounters William, a Clown (Shaksper), in the Forest of Arden. It seems that William has laid claim to Audrey (the plays), but she assures Touchstone that "he hath no interest in me in the world". (Audrey is called a "foul slut", for the theatre was held in low repute and Oxford's name "receives a brand"—Sonnet 111—for being associated with it.) There is talk of a *vicar*, Sir Oliver *Martext* (III.3.41), who is of course the *vicarious* writer who *mars* the *text* of the plays which Shaksper—calling himself Shakespeare?—has procured—the "stolne and surreptitious copies"—to sell to the printers heretofore unable to obtain them. Touchstone says that "all your writers do consent that ipse is he. Now, you are not ipse, for I am he." (All the writers knew Shakespeare's identity.) And in an amusing speech suited to the Clown's vulgar understanding, Touchstone orders William to leave the forest. William departs forthwith, just as Shaksper left London when it was decided to publish some of the plays at last and Meres was employed to do the publicity work.

Ben Jonson pictures this same brash pretender, whom he calls "a gull", in *Every Man Out of His Humour*. E. Ver, the Man—the knight, Puntarvolo—is irritated by the smart-aleck doings of Sogliardo, the gull, and Shift, his bohemian *alter ego*, who has secretly "set up his play-bills at Paul's" then struts around "using action to his rapier" (*i.e.*, shaking his spear). Sogliardo brags of the coat-of-arms he has obtained (everyone knows about Shaksper's hard-won coat-of-arms), and it develops that this blazons "a Boar *without a head*, . . . ramping to gentility". Oxford's crest was a Blue Boar. It is all crystal clear.

So is the allusion in *The Winter's Tale* where Autolycus, the comedic aspect of Shakespeare, says, "O, that ever [E. Ver] I was born!" and the Clown replies, "I' the name of me!" The Clown here is Shaksper again, shown with his father, the Shepherd. He tots up wool, characteristically counting his money. He assures Autolycus he has been "a gentleman born . . any time these four hours." The scene is "the seacoast of Bohemia": that is, Bohemia London, the world of the theatre.

IX.

One of the most extraordinary features of the orthodox case for William Shaksper of Stratford as the author is its reliance upon the Introduction to the First Folio as evidence. For a thoughtful examination shows this to be a hoax.

To begin with, the Droeshout engraving could hardly be a representation of the supreme poet of the English race. That it was not meant to be taken seriously is apparent from the fact that the face is covered by a mask which shows along the edge of the jaw and has a tab for the ear. The clothes are absurd: one sleeve is put in backwards, and there is no neck beneath the preposterous collar. Jonson's verse, *To the Reader*, is equally ambiguous. The discerning reader was expected to penetrate the double intent.

> This Figure, that thou here seest put,
> It was for *gentle* Shakespeare cut;
> Wherein *the Graver had a strife*
> *With Nature to outdo the Life*;
> O, could he have but drawn his Wit
> As well *in Brass*, as he has *hit*
> His Face; the Print would then surpass
> All, that was *ever writ in Brass*.
> But since he cannot, Reader, look
> Not on his Picture, but his Book.

The Elizabethans used words with discrimination and subtlety. Bacon defined *figure* as an *outline*. (Here we have the "Figure" behind the mask.) "Gentle" from *gens*, or *genus*, refers to *family, race*. The "Graver" is fighting with "Nature to outdo", or exceed, "the Life"; therefore to make a caricature. Engravers used copper, not "brass"; but the Elizabethans used the word *brass*, as we do, for *impertinence*. "Hit" is an old form of the past participle of the verb *to hide*. (See Murray's *Oxford English Dictionary on Historical Principles*.) We are supposed to read it thus:

> This *Outline* that thou here seest put,
> It was for *high-born* Shakespeare cut;
> Wherein the Graver had a strife
> With *Reality, travestying* the Life
> O, could he but have drawn his Wit
> As *brashly* and *boldly* as he has *hid*
> His Face, the Print would then surpass
> All that was *E. Ver* shown [here] in a Brazen Hoax.

For the rest, briefly stated, Ben Jonson, as impresario, himself wrote the two letters signed by the common actors, Heminge and Condell (the men whose names were interlined as an afterthought in Shaksper's will as beneficiaries of small gifts). In the first of these, the Earls of Pembroke and Montgomery (the latter a son-in-law of the Earl of Oxford and thus one of "the grand possessors"[10] of the manuscripts) are addressed in an excessively sycophantic manner by these humble fellows, who call the dramas "trifles" and Shakespeare "so worthy a friend and fellow". But legal terms and classical language are used in the letter, together with a paraphrase of Pliny's dedication of his Natural History to the Emperor Vespasian, not translated into English until 1635: the whole text is far beyond such simple men as Heminge and Condell. Thus Jonson tips off the astute reader with a wink.

He goes further. He has Leonard Digges refer to "thy Stratford Monument"; for this is a paid advertisement

10. Spoken of in the prologue to the 1609 edition of TROILUS AND CRESSIDA.

to take in the general public. (It was a bold move to publish these plays at all.) But here we detect the wink too, for Digges says, "when . . . *Time dissolves* thy Stratford Monument". The clever Elizabethans would have been astonished to know how long it would take Time to do this!

In the second, the sales-letter, Jonson has his stooges say that they hope readers will "*understand*" these plays or have them explained by someone who can. Thus they "mock their own presage": the works are not "trifles".

Now, having produced this mockery, the paid advertisement designed to deceive the gullible, Ben Jonson makes a *volte-face* and, in a spirit of devotion to truth, gives us the real Shakespeare, the supreme poet, in his Introductory Poem.

> . . . I confess thy writings to be such
> As neither Man nor Muse can praise too much.
> 'Tis true, and *all men's* suffrage. But *these ways*
> *Were not the paths I meant* unto thy praise.

The plays are not "trifles". "All men", even vulgar actors, have a right to praise Shakespeare, but this was not the way *I* meant to do it.

> For seeliest *Ignorance* on these may light,
> Which, when it *sounds* at best, but *echoes right.*

Blindest "Ignorance" is taken in by the *sound* of these words, which is only a superficial impression of their "right" meaning. He adds that "Blind Affection" may swallow the thing whole, not *advancing* "the truth" but *groping* along. Or "crafty malice" might "pretend" that this is praise,

> And think to *ruin* where it *seem'd to raise.*

Precisely: just what the common actors' letters have tried to do. Their praise has been a disservice.

> *These* are, as some infamous Bawd or Whore
> Should praise a Matron, *what could hurt her more?*
> But *thou art proof against them,* and indeed
> Above *th' ill fortune of them, or the need.*

So much for the unworthy deception. Shakespeare is "proof against" the detracting praise of such low men.

> *I therefore will begin.* Soul of the Age!
> The applause! delight! the wonder of our stage!

From now on Jonson is talking about the great human being who was Shakespeare, who, he straightway says, is "a Monument without a Tomb". (Shaksper of Stratford had both.) He states that his "peers" in the matter "of years" were Lily, Kyd and Marlowe; and he adds with a wily use of the subjunctive,

> And *tho'* thou *hadst* small Latin, and less Greek,
> From thence to honour, thee, I would not seek
> For names.

Even if you *had* had small Latin and less Greek, you would still be above comparison with the great classical writers.

> Triumph, my Britain, thou hast one to show
> To whom *all scenes of Europe homage owe.*

Shakespeare wrote familiarly about European scenes. And Jonson adds that

> all the Muses still were *in their prime*
> When like Apollo he came forth . . .

The true Shakespeare, Oxford, was the first, with his godlike creative genius (he had been called Phoebus at court): the other playwrights had learned from him.

And now Jonson tells us that Shakespeare was of noble ancestry, that *he wrote what he was:*

> Look how the Father's face
> Lives in his Issue; even so *the race*
> Of Shakespear's *mind and manners brightly shines*
> *In his well-turned and true-filed lines:*
> In each of which he seems to *shake a Lance*
> *As brandish't at the eyes of Ignorance.*

Surely this is straight speaking. He is the Spear-shaker, not Shaksper in whom "Ignorance" is led to believe.

Follows the "Sweet Swan of Avon" passage, which is again double-talk. For Oxford had three homes on the river Avon,[11] and he had acted in his own plays at Wilton, the home of the Pembrokes, on the Little Avon.

And so Jonson pays the great Shakespeare the tribute that is due him at last:

> *Shine forth, thou Star of Poets!*

11. At one of these, Billesley, in a part of the original house still standing, there is a room called "the Shakespeare Room", where tradition says Shakespeare wrote As You Like It.

Classified

RATES 25 *cents per word for each insertion: minimum charge of* $2.50 **payable in advance.** *Copy should reach us by the first day of the month preceding month of issue. Allow two extra words for box number. Address all replies to blind ads in care of* AMERICAN BAR ASSOCIATION JOURNAL, *1155 East 60th Street, Chicago 37, Illinois.*

BOOKS

WRITE US FOR YOUR TEXT BOOK NEEDS. Good used law books bought, sold and exchanged. (In business 50 years.) THE HARRISON COMPANY, 93 Hunter Street, S. W., Atlanta 2, Georgia.

LOWEST PRICES USED LAW BOOKS COMplete stocks on hand, sets and texts. Law Libraries appraised and bought. NATIONAL LAW LIBRARY APPRAISAL ASSOCIATION, 127 South Wacker Drive, Chicago 6, Illinois.

USED LAW BOOKS AT ATTRACTIVE prices. We buy and sell either one book or a complete library. Let us quote you prices. HARRY B. LAKE, 321 Kearney Street, San Francisco 8, California.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CLARK BOARDMAN CO., LTD., 11 Park Place, New York City.

THOMAS LAW BOOK COMPANY PUBLISHers. We Sell, Buy and Exchange. Incorporated 1885. St. Louis 2, Mo.

LAW LIBRARIES OR LESSER COLLECtions of esteemed used law books purchased. Price list free on request lists some used law books we have for sale, also indicates the type materials we will purchase. Claitor's Book Store, Baton Rouge 2, Louisiana.

"THE HAND OF HAUPTMANN." STORY of Lindbergh Case by Document Expert cited by John Henry Wigmore, 368 pages, 250 Illustrations. Price $5.00. J. V. HARING & J. H. HARING, 15 Park Row, New York 38, N Y.

LAW BOOKS BOUGHT, SOLD, EXchanged. Free Catalogue. IRVING KOTHS, 516½ Main St., Vancouver, Washington.

WHEN YOU HAVE A DOCUMENT CASE TO try, send for "The Problem of Proof" (in Disputed Document Trials), by Albert S. Osborn, 539 pages, with an introduction by John Henry Wigmore ($10.50). ("Questioned Documents" and "Questioned Document Problems" are both temporarily out of print.) Also available, "The Mind of the Juror," at $6.00. Send to Albert D. Osborn and Associates (Examiners of Handwriting, Typewriting, Erasures, etc.), 233 Broadway, New York 7, N. Y.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CECIL SKIPWITH, 108 East Fourth Street, Los Angeles 13, California.

LAW OF DISPUTED AND FORGED DOCUments. J. Newton Baker makes a very important contribution in this field. $15.00. The Michie Company, Charlottesville, Va.

LAW BOOKS—WE CAN SUPPLY THE following sets at this time: U.S. Attorney General Opinions, complete sets or odd volumes—Decisions of the Commissioner of Patents, complete sets or odd volumes. Practically all Law Reviews and Periodicals published in the U.S.A. Law Books bought, sold and exchanged. Write us for your every law book need. DENNIS & CO., INC., 251 Main St., Buffalo 3, New York.

ORDWAY HILTON'S *"SCIENTIFIC EXAMINATION OF QUESTIONED DOCUMENTS* is of particular value to all practicing attorneys and field investigators and a conventional aid to the trial lawyers in the presentation of evidence of this type in the courtroom" writes Nat P. Ozmon in Northwestern University Law Review. *SCIENTIFIC EXAMINATION OF QUESTIONED DOCUMENTS* by Ordway Hilton, 1 Vol., illustrated, $15.00 delivered. Callaghan & Company, 6143 N. Cicero Avenue, Chicago 46, Illinois.

LAW BOOKS NEW AND USED BOUGHT and sold at attractive prices. JOHN BANKHURST, Union Commerce Building, Cleveland, Ohio.

FOR SALE

UNDERWOOD CARD DIGEST OF PAT., Copyright and Trademarks in a fireproof file cabinet, to date as far as published; Int. Rev. Cum. Bulletins complete in original binding; Atlantic, Northeastern and Northwestern Reporters; U.S. Sup. Ct. Reporter (West) and new Digest; Wigmore Evidence; Mertens Taxation; Fletcher Corp.; Decennial Digests 1st thru 5th. All used in good condition. Lawyers Service Co., 2208 Pine St., St. Louis 3, Mo.

HANDWRITING EXPERTS

HARRY M. ASHTON, 4574 FOURTEENTH Ave., North, St. Petersburg, Fla. DIckens 2-2391. Twenty years Nationwide experience. Qualified in all courts. Formerly in charge of U. S. Government laboratory. Fellow, American Academy of Forensic Sciences. See Martindale-Hubbell Law Directory for qualifications.

RICHARD BOWEN, DETROIT 27, MICH. 28 years' experience. Qualified in all courts. Completely equipped laboratory. 10023 Hubbell Ave. VErmont 7-6454.

DONALD DOUD, CHICAGO, MILWAUKEE. Chairman, Document Section, American Academy of Forensic Sciences; Director, American Society of Questioned Document Examiners. 312 East Wisconsin Avenue, Milwaukee; Temple Building, Chicago.

VERNON FAXON, EXAMINER OF QUEStioned documents. Opinions rendered re: Handwriting, typewriting, erasures, interlineations, substitutions on wills, deeds, contracts, books of account, and all kinds of documents. Suite 1408, 134 North LaSalle Street, Chicago 2, Ill. Telephone: CEntral 6-1050.

E. H. FEARON, BESSEMER BUILDING, Pittsburgh 22, Pa. Office telephone: ATlantic 1-2732; residence telephone: TEnayson 5-7865. Scientific examination of disputed documents. Completely equipped laboratory. Photographic exhibits including third dimension and color made to demonstrate facts in court. Nationwide experience.

BEN GARCIA, EXAMINER OF QUESTIONED handwriting and typewriting. Qualified expert. Over 15 years' experience. 810 E. & C. Building, Denver, Colorado. Phone AComa 2-2360.

LINTON GODOWN, MEMPHIS, EXAMINER handwriting, signatures, hand-printing, typewriting, erasures, alterations, inks, etc. See Martindale-Hubbell. Member A.S.Q.D.E. 1830 Exchange Bldg., JAckson 5-1711.

HARRIS & HARRIS, 510 SOUTH SPRING Street, Los Angeles, telephone MAdison 5-1518 and 703 Market Street, San Francisco, telephone DOuglas 2-4329. Discovery and proof of facts relating to disputed handwriting, typewriting, inks and papers. Over 25 years' experience. Qualified in all courts. Members: American Society of Questioned Document Examiners.

LUKE S. MAY. CONSULTING EXPERT & examiner of "Questioned Documents". Qualified all courts United States and Canada. Advanced Scientific Evidence Laboratories for proof of facts, all types disputed papers. Phone Main 3-2445, 843 White-Henry-Stuart Building, Seattle 1, Washington.

M. A. NERNBERG, EXAMINER OF DISputed Documents. Thirty years' experience. Formerly specially employed by the United States Government as handwriting expert in cases involving handwriting. 3219 Grant Building, Pittsburgh, Pa. Phone ATlantic 1-1911.

WM. H. QUAKENBUSH—30 YEARS' EXPErience in the disputed document field. Qualified in all courts. Fully equipped laboratory. Listed in Martindale-Hubbell Directory. Phone VI 3-7826, Box 424, Lawrence, Kansas.

KARL SCHOTTLER, ST. LOUIS, MO., Telephone GArfield 1-3399. Scientific Technique in Document Examination.

CHARLES C. SCOTT, KANSAS CITY, MO. Author: *Photographic Evidence.* Handwriting and typewriting identified. Forgeries and alterations detected. Faded and obliterated writing deciphered. Nationwide experienced consultant and expert witness. Commerce Trust Building, VIctor 2-8540.

DR. WILMER SOUDER, CONSULTANT. REports, Exhibits, Testimony. See Martindale-Hubbell Law Directory for qualifications. 3503 Morrison St., Washington 15, D.C. Phone: WOodley 6-3050.

HANNA F. SULNER, NEW YORK CITY. Qualified examiner of all kinds of questioned documents; expert testimony illustrated. 35-30 81 Street, Jackson Heights 72, New York. IL. 8-6176.

GEORGE G. SWETT, DOCUMENT EXPERT with Post Office Department 12 years. Handwriting, typewriting and other document problems considered. Photographic laboratory maintained. Nation-wide qualification. Member ASQDE, 14 South Central, St. Louis 5, Mo. PArkview 5-9394.

JOSEPH THOLL, EXAMINER OF QUESTioned Documents. 58 Bellview Avenue, Chagrin Falls, Ohio. Telephone: Chestnut 7-6731. 26 years' experience. Author of recognized articles. Retained by United States Government, Congressional Committees, State of Ohio, Legal Profession in United States, Canada and foreign countries. Formerly Expert for Base Legal and Intelligence Departments, AAF. Civilian Examiner for Cleveland Police Department.

HERBERT J. WALTER (1879-1958) LINTON GODOWN—Examiners and Photographers of Questioned Documents. Member A.S.Q.D.E., Fellow A.A.F.S. Suite 2210, 100 North LaSalle St., Chicago 2—phone CEntral 6-5186.

GEORGE L. WHITE, EXAMINER OF QUESTioned Documents, 4229 Brook Road, Richmond, Virginia.

DETECTIVES

THEO. R. GREVERS INTERNATIONAL PRIvate Detective; Specialized foreign, Surveillance, Subterfuge, Undercover; Personal, Criminal, Industrial, Insurance, Inheritance, Missing Persons and Assets, Patent Infringement, Foreign Market and Branch-Plant Location Investigations; Investigators male and female, speaking German, Swedish, Dutch, French, Spanish; References, Licensed, Bonded, Notarized Reports, Testimony; Box 978, Battle Creek, Michigan; Telephone, Woodward 4-2445.

MISCELLANEOUS

PATENT COPIES—We will AIRMAIL copies of any United States Patents to you within 4 hours. Merely send the numbers of the patents you desire and a check or money order ($1.00 for the first patent and 50 cents for each additional patent) to AIRMAIL PATENT COPY SERVICE, NATIONAL PRESS BLDG., Washington 4, D. C.

ROBES

JUDICIAL ROBES CUSTOM TAILORED — The best of their kind—satisfaction guaranteed —Catalog J sent on request. BENTLEY & SIMON, INC., 7-9 West 36th St., New York 18, N. Y.

TITLE INSURANCE

TITLE INSURANCE IN SOUTH LOUISIANA. Complete service. Representing the Kansas City Title Insurance Company. Contact Dutel Title Agency, Inc., 823 Perdido Street, New Orleans, Louisiana.

POSITIONS WANTED

ASSISTANT COUNSEL, PRESENTLY SERVing with New York Administrative Agency, seeks association with law firm or corporation where experience in administrative proceedings and adjudications will be of value. Position must offer opportunity for retention of own practice. Available January 1st, 1960. Box 9S-2.

EIGHT YEARS UNIQUE INTERNATIONAL legal and administrative experience. Seek counsel or management position international business. Harvard LL.B. Age 35. Box 9S-3.

ENERGETIC PATENT LAWYER, 31, WOULD like to associate with a non-patent law firm. Am member of the Bar and registered in the Patent Office, and have seven years experience in private practice involving all phases of patent law and related matters, including a thorough knowledge of preparing patent and trademark applications and prosecuting them in the Patent Office. If you are a small or medium size firm in a growing industrial community with a dearth of patent lawyers, this ad may interest you. Box 9S-4.

TAX ATTORNEY, HARVARD, FIVE YEARS' experience in tax and corporate law with Wall Street firm. Seeks responsible position with corporation or law firm outside lower Manhattan. Box 9S-5.

LAW-ENG-MGT, B.M.E., M.S. (mgt.) LL.B.; 9 yrs. R&D experience in design, project engineering, contract management, and planning in electromechanical and electronic field. 2 yrs. staff supervisory experience in production planning and control, and production management. Recently admitted to Maryland bar. Married; age 34. Present salary $12,500. Desire interesting position with future in which background can be effectively utilized. Prefer Washington, D. C. area. Box 9S-6.

ATTORNEY, 31, SEVEN YEARS GENERAL practice, experienced in negligence litigation, seeks location in California. Box 9S-7.

TECHNICAL SERVICES AVAILABLE

CONSULTING BIOLOGISTS — POLLUTION Effects and Water Quality, fresh and saltwater Investigations, Reports, Court Testimony. Thomas Dolan, Charles B. Wurtz, Ph.D., 610 Commercial Trust Building, Philadelphia, Pennsylvania.

ECONOMIC, STATISTICAL, MARKETING Consultation and Research—Federal Trade Commission, antitrust, contract, tax cases. References on request. W. Halder Fisher & Associates, 1112-13th Street, Northwest, Washington 5, D.C. REpublic 7-7866.

CLARENCE S. BRUCE, TRAFFIC ACCIDENT Analyst — Reconstruction, Consultation, Expert testimony. Automotive Engineer, formerly with National Bureau of Standards, Washington, D.C. Box 7S-1.

WEATHER EXPERT (PH.D.) AVAILABLE for consultation and testimony. Box 9F-6.

MANAGEMENT CONSULTING SERVICE for Law Offices—specific problems or complete office. Covers Organization, Costs, Policies, Work Distribution, Billing, Salary Plans, Controls, Files, Office Manuals, Special Projects. Daniel J. Cantor and Company, Six Penn Center Plaza, Philadelphia 3, Pa.

PATENT LAWYERS—DO YOUR CLIENTS need models made; or are they looking for a manufacturer? Raydie, 248 Interstate, Addison, Illinois.

CONSULTING PETROLEUM GEOLOGIST. Oil and Gas Property Evaluation. Management & Counsel of Properties. Practical Oil Field Analysis. Addison L. Hayner, 2 W. 46th St., N.Y.C. CI 6-6473.

Association Calendar

Annual Meetings

Washington, D. C.	August 29-September 2, 1960

Regional Meetings

Memphis, Tennessee	November 12-14, 1959
Houston, Texas	November 9-12, 1960